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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-1409

LONNIE NORTH ..... APPELLANT

VS:

C. B. RUSSELL AND NATHANIEL "TRAP" HELTON, JAILER OF HARLAN COUNTY ..... APPELLEES

ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Court of Appeals of Kentucky, rendered on March 21, 1975. The judgment re-affirms on remand from this Court a decision by the Harlan Circuit Court denying apellant's petition for writ of *habeas corpus*. Appellant submits this Statement to show that the Supreme Court of the United States has *jurisdiction* of the appeal and that a ***substantial federal question*** is presented.

(a) OPINION BELOW

The opinion of the Court of Appeals of Kentucky is

of this date, unreported. A copy of the opinion appears in the Appendix hereto.[1]

(b) JURISDICTION

(1) Nature of the Proceedings

This suit was filed by Appellant, North, in Harlan County, Kentucky Circuit Court seeking, by writ of *habeas corpus*, to secure his release from confinement in the Harlan County Jail under a sentence of 30 days imprisonment imposed by appellee, Russell, Lynch City Police Judge. North was convicted in the Lynch City Police Court of the crime of driving while intoxicated, fined $150.00, and imprisoned for a term of 30 days in the Harlan County Jail. North's driving privileges were also revoked. In the trial court, North maintained that his rights to due process and equal protection of the laws accorded to him as a citizen of the United States of America by the Fourteenth Amendment of the United States Constitution were abridged,[2] in that he was accused, "tried", and convicted in a court presided over by a Judge, destitute of legal competency and capacity, who derived his authority under certain Kentucky Statutes.

(1) Trial Court Proceedings

After issuing its writ of *habeas corpus* and enlarging the appellant on bail, the Harlan Circuit Court held a full

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1. Appendix 1, Page 1a-5a.

2. The petition for writ of habeas corpus, raising the issues presented in this statement in the Harlan Circuit Court, is printed in Appendix 2, Page 6a-11a of this Statement.

evidentiary hearing on July 23, 1974, Appendix 5, Page 19a. Following the hearing, it reluctantly dissolved the writ of *habeas corpus* under the precedent of *Ditty* v. *Hampton*, 490 S.W.2d 772 (Ky. 1972),[3] *dismissed as moot*, 414 U.S. 885 (1973), and ordered North remanded to the custody of the Harlan County Jailer, permitting him to continue on bail provided he file a notice of appeal to the Court of Appeals of Kentucky.[4] On July 23, 1974 appellant filed his designation of the entire record, together with his notice of appeal to the Court of Appeals of Kentucky. On August 5, 1974, he filed his motion for appeal and other necessary papers.

(2) Initial State Appellate Court Proceedings

On August 12, 1974, the Court of Appeals of Kentucky, the Court of last resort in Kentucky, affirmed *per curiam* the judgment of the Harlan Circuit Court, granting the motion for appeal, but denying the writ of *habeas corpus* and setting aside North's bail, *North* v. *Russell*, 516 S.W. 2d 103 (Ky. 1974).

On August 26, 1974, North filed with the Court of Appeals of Kentucky his notice of appeal that the decision

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3. The trial court dissolved the writ with reluctance and only after slapping the system that "allows persons of insufficient training, knowledge and experience to preside at criminal trials which, inherently, require a great deal of training, knowledge and experience in order that each citizen be accorded the rights guaranteed to him by the law".

4. The opinion of the trial court is printed in Appendix 3, Page 12a-16a.

of the Court of Appeals of Kentucky was appealed to the Supreme Court of the United States of America pursuant to *28 U.S.C. Section 1257* (2) (1970).

(3) Previous United States Supreme Court Proceedings

That first appeal to this Court was docketed October 16, 1974 as number 74-437. On that appeal this Court vacated the judgment of the Kentucky Court of Appeals and remanded the case, *North* v. *Russell*, 516 SW 2d 103 (Ky. 1974), *Judgment vacated*, 95 S.Ct. 673 (1974), to the Court of Appeals of Kentucky "for further consideration in light of the position presently asserted by the Commonwealth". The remand had been urged by the Attorney General of Kentucky upon his suggestion that North should be released "solely upon the basis of violations of Kentucky Law. . . ."

(ii) Judgment on Remand and Notice of Appeal

On March 21, 1975, the Court of Appeals of Kentucky, *while recognizing the absurdity of the lay judge system*, again affirmed the judgment of the trial court, noting that the Federal Constitutional questions urged throughout this case were the only questions presented on this appeal and that there were no State questions presented (as argued by the Attorney General in his motion to dismiss or affirm) upon which North might be freed. See Appendix 1, Page 1a.

The Court of Appeals again refused to order North's release. On March 26, 1975, North again filed a Notice of Appeal that this most recent decision of the Court of Appeals was appealed to the United States Supreme Court pursuant to 28 U.S.C. Section 1257 (2) (1970).[5]

(iii) Statutes Conferring Jurisdiction

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. Section 1257 (2) (1970). Certiorari jurisdiction is conferred by 28 U.S.C. 1257 (3) (1970).

(iv) Cases Sustaining Jurisdiction

It is contended that the following cases sustain the jurisdiction of this Court: *Cox* v. *State of Louisiana*, 379 U.S. 536 (1965); *Mills* v. *State of Alabama*, 384 U.S. 214 (1966); *Lovell* v. *City of Griffin*, 303 U.S. 444 (1938).

(v) Statutes Involved

The validity of Kentucky Revised Statutes Sections 26.010, 26.140, 26.150 (1), 26.200 and Kentucky Constitution, Section 130 are involved in this appeal.

Kentucky Revised Statute Section 26.010 provides:

> "Except as provided in K.R.S. 167.990, 208.020, subsection (4) of 208.990 and 242.990, police courts in *cities of every class* have jurisdiction exclusive of circuit courts in all penal and misdemeanor cases where the punishment is limited to a fine of not more than twenty dollars, jurisdiction concurrent with circuit courts of all penal and misdemeanor cases where the punishment is limited to a fine of not more than

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5. Appendix 4, Page 17a-18a.

five hundred dollars, or imprisonment not exceeding twelve months, or both, and exclusive jurisdiction of all violations of city ordinances occurring within the city limits". (Emphasis added).

Kentucky Revised Statute Section 26.140 provides:

"The judge of the police court in cities of the *first class* shall have the qualifications and take the oath required of circuit judges. The judge shall devote his whole attention to the duties of his court. He shall have each year a vacation of two months. Subject to K.R.S. 26.300, the judge may adopt rules and regulations for conducting the business of his court, and may enforce them by process of contempt. He shall have all powers necessary to try cases coming under his jurisdiction. He may administer oaths, and shall be a conservator of the peace. His salary shall be fixed by ordinance, and paid at the same time and in the same manner as the salaries of other city officers". (Emphasis added).

Kentucky Constitution Section 130 provides:

"No person shall be eligible as judge of the circuit court who is less than thirty-five years of age when elected, who is not a citizen of Kentucky, and a resident of the district in which he may be a candidate two years next preceding his election, and who has not been a practicing attorney eight years."

Kentucky Revised Statutes Section 26.150 (1) provides:

"In cities of the *second class* the police court shall have

one judge. He shall receive an annual salary of not more than $12,600 to be fixed by ordinance, and no other compensation except the fees allowed to judges for holding examining trials in felony cases. He shall have each year a vacation of one month. No person shall be eligible to be police judge unless at the time of his election he is at least twenty-five years of age and has been a resident of the city for at least four years, and is an attorney-at-law". (Emphasis added.)

Kentucky Revised Statutes Section 26.200 provides:

"No person shall be eligible to be police judge in a city of the *fifth* or *sixth class* unless he is a resident and voter of the city, and has resided there for a year next preceding his election or appointment. Before entering upon the duties of his office, the judge shall execute a bond to the Commonwealth with good and sufficient sureties, approved by the county judge. The bond shall be filed and recorded in the county clerk's office and an entry made upon the order book of the county court, showing that the bond was executed and approved and giving the names of the sureties. The county judge, at any time that he has reason to believe that the bond is not good or that the sureties are about to become insolvent, shall require that a new bond be executed or additional sureties given on the old one." (Emphasis added).

The Statute under which the appellant is imprisoned is KRS 189.520 (2).

KRS 189.520 (2) provides:

"No person shall operate a motor vehicle anywhere in this state while under the influence of intoxicating beverages or any drug which may impair one's driving ability."

KRS 189.990 (10(a) (1972), provides:

"Any person who violates subsection (2) of KRS 189.520 shall be fined, for the first offense, not less than $100.00 nor more than $500.00, and for each subsequent offense he shall be fined not less than $100.00 nor more than $500.00 and imprisoned for not more than six months."

(c) STATEMENT OF QUESTIONS PRESENTED

(1) Are Kentucky Revised Statutes, Sections 26.010, 26.140, 26.150 (1), and 26.200 invalid under the Equal Protection clause of the Fourteenth Amendment of the United States Constitution insofar as those statutes subject the appellant (a criminal defendant convicted and sentenced to a term of confinement in a city court in a fifth class city) to spurious trial, conviction, and imprisonment before a judge: (a) who was untrained in the law and unfamiliar with the substantive and procedural rights guaranteed to the appellant by the Constitution of the United States and the laws and Constitution of the Commonwealth of Kentucky; (b) who because of such lack of training and unfamiliarity, lacked the competency and capacity to afford appellant a fair and impartial trial; (c) who actually failed to provide appellant with a fair and impartial trial; whereas a criminal defendant accused of identical crimes in courts of identical name, territorial, and criminal jurisdiction in a first and second class city (designated as such

solely on the basis of population) is accorded a judge trained and licensed as an attorney?

(2) Is Kentucky Revised Statute, Section 26.200, fixing the qualifications of police judges in fifth and sixth class cities invalid under the due process clause of the Fourteenth Amendment to the Constitution of the United States of America, insofar as that statute subjects the appellant (a criminal defendant accused, convicted and sentenced to a term of imprisonment in a city court in a Kentucky Fifth Class City) to spurious trial, conviction and imprisonment before a judge: (a) who was untrained in the law and unfamiliar with the substantive and procedural rights guaranteed to the appellant by the Constitution of the United States of America and the laws and Constitution of the Commonwealth of Kentucky; (b) who, because of such lack of training and unfamiliarity, lacked the capacity to afford the appellant a fair and impartial trial; and (c) who actually failed to provide appellant with a fair and impartial trial?

(3) Does the due process clause of the Fourteenth Amendment to the United States Constitution prohibit the spurious trial, conviction and imprisonment of the appellant, a defendant accused of misdemeanor conduct in a Kentucky Police Court, before a tribunal presided over by a judge who: (a) was not cognizant or familiar with the substantive and procedural rights guaranteed to the appellant by the Constitution of the United States and the laws and Constitution of the Commonwealth of Kentucky; who, because of such lack of training and familiarity, lacked the ability, capacity and competency to afford appellant a fair and impartial trial, and; actually failed to

provide appellant with a fair and impartial trial; and, (b) was fully reliant on the city prosecutor for legal information and interpretation?

(d) STATEMENT OF THE CASE

On July 10, 1974, the appellant, Lonnie North, was arrested in Lynch, Kentucky, and charged with the crime of driving while intoxicated denounced by KRS 189.520 (2), penalty, 189.990 (10) (a).[6] He was directed to appear for trial on July 18, 1974, at 7:00 P.M. before the Lynch City Police Court. This court is located in a Kentucky city of the fifth class[7] and is presided over by the appellee, C. B. Russell.

At the appointed time and place, North appeared for trial, and, upon entering a plea of "not guilty," demanded a trial by jury. The occurrences at the appellant's "trial" are substantially agreed upon by all the persons who testified in this action before the Harlan Circuit Court as follows:

(1) North entered a plea of "not guilty."

(2) North, indeed, demanded a jury trial, to which he was entitled (Ky. Const. 11, KRS § 25.014).

(3) The appellee, C. B. Russell, called the city prosecuting attorney for advice as to whether or not he was required to grant appellant a jury trial.

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6. Appendix 7, Page 39a.

7. Kentucky Revised Statutes § 81.010.

(4) The appellee, C. B. Russell, advised the appellant that he was not required to grant to him a jury trial and that he intended to proceed to try him himself.

(5) Appellee, C. B. Russell, after hearing only the arresting officer, adjudged the appellant guilty of the crime of driving while intoxicated and imposed a fine of $150.00, sentenced him to 30 days in the county jail,[8] and revoked his driver's license.

(6) At the said "hearing," the appellant was not afforded a trial by jury; was not advised of his right to trial by jury; was not advised of his right to confront all witnesses against him and to cross-examine such witnesses; was not advised of his right to legal counsel; was tried and convicted without having the aid and assistance of legal counsel; and was not advised of his right against self-incrimination.

(7) The City Police Court of the City of Lynch, Lynch, Kentucky, is presided over by a lay judge who, admittedly, is not cognizant of the various constitutional, statutory, and common-law substantive and procedural rights guaranteed to the appellant as a citizen of Kentucky and as a citizen of the United States of America, and does not possess the necessary knowledge, understanding, training, or experience to

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8. Even the imprisonment imposed at this spurious "trial" was unauthorized since the penalty for the first offense is limited to a fine only and since the charge did not specify multiple offenses. KRS § 189.990(10)(a), Appendix 7.

enable him to accord to the appellant such various constitutional, statutory, and common-law substantive and procedural rights.

(8) The appellee, Russell, was fully dependent upon the city prosecuting attorney for decisions upon legal questions emerging during criminal trials.[9]

After having spent the better part of a full day in jail under the conviction, North, on July 19, 1974, filed in the Harlan Circuit Court a petition for writ of *habeas corpus,* seeking his release. The allegations in that petition are set forth in *Appendix* 2. A writ of *habeas corpus* issued on July 19, 1974, and was directed to appellee, C. B. Russell, the City Judge, and Nathaniel "Trap" Helton, the jailer to whose custody North was committed. On the same day, North was ordered released on bail. Following the hearing held at Harlan, Kentucky on July 23, 1974, the Harlan Circuit Court, after reciting the various constitutional challenges of appellant, dissolved the writ of *habeas corpus,* see *Appendix* 3. While expressing doubt about the soundness of the decision of the Court of Appeals of Kentucky in *Ditty* v. *Hampton,* supra, the court felt bound by that decision and ordered North remanded to custody. enlarging him on bail in the event that he should file a prompt notice of appeal to the Court of Appeals of Kentucky. On the same day, July 23, 1974, he filed his Notice of Appeal and his designation of the entire record.

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9. For confirmation of some of these occurrences we have reprinted Judge Russell's entire testimony in Appendix 5, Page 19a-37a.

On August 5, 1974, North filed in the Court of Appeals of Kentucky his Motion for Appeal, together with the appropriate record and other necessary documents.

In the Court of Appeals of Kentucky, the constitutional arguments set forth in the petition for writ of habeas corpus and presented in this appeal were duly argued and presumably considered by the Court of Appeals since, on August 12, 1974, the Court of Appeals of Kentucky granted the motion for appeal and affirmed the decision of the Harlan Circuit Court in its entirety, citing *Ditty* v. *Hampton, supra,* although it did set aside appellant's bail, *North* v. *Russell,* 516 SW 2d 103 (Ky. 1974). Appellant was freed on a stay order by Honorable Justice Potter Stewart entered September 10, 1974.

The decision of the Court of Appeals was appealed to the Supreme Court of the United States and was docketed in this Court on October 16, 1974 as number 74-437. In his motion to dismiss or affirm, the Attorney General suggested that this Court remand the case to the Kentucky Court of Appeals for "that Court's consideration of whether or not appellant should be granted a writ of *habeas corpus* solely upon the basis of violations of Kentucky law. . . " On December 23, 1974, this Court entered the following remand order:

> "Upon the representation of the Attorney General of Kentucky set forth in his motion to dismiss or affirm filed in this Court on November 29, 1974, the judgment is vacated and the case is remanded to the Court of Appeals of Kentucky for further consideration in light of the position presently asserted by the Commonwealth", 95 S. Ct. 673 (1974).

Upon remand to the Court of Appeals of Kentucky, the remand order was argued by briefs filed by both parties. The Attorney General presented to that Court the same contentions advanced in his motion to dismiss or affirm in this Court, that is, that appellant should be released upon the basis of violations of Kentucky Law. North argued that such release would put him right back in Judge Russell's Court for re-trial. On March 21, 1975, the Court of Appeals of Kentucky, again relying on *Ditty* v. *Hampton*, supra, rendered its final decision, denying North's release to freedom and holding that no state questions were presented in this appeal. That most recent final decision is found in Appendix 1 hereof.

On March 26, 1975, North again filed his Notice of Appeal that the decision of the Court of Appeals of Kentucky was again appealed to the Supreme Court pursuant to 28 U.S.C. Section 1257 (2) (1970).

In the trial court and in the Kentucky Court of Appeals, North attacked his conviction upon serious constitutional grounds:

(1) He challenged the constitutionality of the statutory scheme embodied in Kentucky Revised Statutes, Sections 26.010, 24.140, 24.150 (1), 26.200 and Kentucky Constitution Section 130, as being unconstitutional and repugnant to the equal protection of laws provisions of the Fourteenth Amendment to the United States Constitution, upon the grounds of unequal and discriminatory treatment of him as an accused in a criminal case.

(2) He challenged the constitutionality of KRS § 26.200, establishing the qualifications of police court judges

in cities of the fifth class, as being repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States of America.

(3) He challenged the constitutionality of his conviction, alleging that the trial judge before whom he was tried, lacked the capacity and competency to accord to him the procedural and substantive rights guaranteed to him by the Constitution of the United States of America and the Constitution and laws of the Commonwealth of Kentucky and, because of such incompetency and because of such incapacity, he was, in fact, denied various of his constitutional rights under such laws.

The challenges set forth in paragraphs (1) and (2) above, since they allege the unconstitutionality of various Kentucky statutes upon specific federal constitutional grounds, are maintained in this appeal as a matter of right, pursuant to 28 U.S.C. 1257 (2). The third ground, specially setting forth a right, privilege or immunity under the Constitution of the United States of America, is maintained pursuant to 28 U.S.C. 1257 (3), under which this court is asked to exercise its discretionary writ of *certiorari*.

In order to place the issues raised in this appeal in an appropriate context, it is necessary to outline the place of the police court in the Kentucky court structure. Candidly termed by the Kentucky Court of Appeals "courts of convenience" not equipped or designed "to conduct error-free trials, or to insure full recognition of constitutional freedoms", *Colten* v. *Kentucky*, 467 S.W. 2d 374, 379 (Ky. 1971), *aff'd*, 407 U.S. 104 (1972), police courts, like their companion courts in the Kentucky inferior court system,

find historical roots in eighteenth century practices and needs. Transplanted from England, the institution of the lay judge, aided by a dearth of legally trained persons and the deep-rooted distrust of centralized authority prevalent at the time, acquired considerable political influence in the governing bodies of the newly formed states. See generally R. Ireland, *The County Courts in Antebellum Kentucky* (1972). With the growth of the country, the institution retained its power and diverse array of functions, both political and judicial, by virtue (a) of the continuing domination of state legislatures by rural interests, where lay judges continued to thrive, and (b) its glorified, but often uncritically accepted, heritage. That the institution survives today, however unsuited to the needs of the day, is a monument to the entrenched political nature of the office, a characteristic seemingly at odds with the vestigially retained complex of judicial functions still exercised by lay judges.

This appeal centers on the Kentucky statutory scheme establishing qualifications for police court judges and conferring criminal jurisdiction upon legally uninformed judges. In Kentucky, the police court is one of four inferior court systems. Along with county, quarterly, and justices' courts, the police court has original jurisdiction in all cases where the punishment is limited to a fine of $20.00, Kentucky Revised Statute § 25.010, and concurrent jurisdiction with the circuit court, the higher court in this two-tier system, in all other penal and misdemeanor cases, defined as those crimes punishable by a maximum of one year in jail and a $500.00 fine, Kentucky Revised Statute 26.010. A defendant convicted in police court has an unconditional right to a de novo appeal in the circuit court, where the circuit judge is by law mandated to be a lawyer, Kentucky Constitution 130. For a more complete description of the Kentucky two-tier system, see *Colten* v. *Kentucky*, 407 U.S. 104 (1972).

The *qualifications* of a police court judge are statutorily prescribed. The Kentucky legislative scheme, pertinent parts of which are set out above, after conferring jurisdiction upon Police Courts in all classes of cities (KRS § 26.010) mandates that accused criminal misdemeanants in first and second class cities, of which there are eight in the state, be accorded a judge who is a lawyer, while defendants in lower class cities may be—and almost invariably are—accorded a judge with no legal training and who, indeed, need have no education whatever. The overall scheme is based solely on a formula classifying cities by population, Ky. Const. § 156.[10] Differing age and durational residency requirements are set out for police court judges in different classes of cities, compare Kentucky Revised Statute § 26.170 with Kentucky Revised Statute § 26.200.

The thrust of one of appellant's constitutional arguments is directed at that part of the statutory scheme requiring criminal defendants oftentimes to be tried before untrained lay people in cities with lower populations. The necessarily inferior treatment encountered by criminal defendants, such as the appellant, in these lower class cities goes to the heart of the appellant's due process argument on pp. 34, *infra*. The discriminatory line drawn between

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10. Appendix 8, Page 40a-41a.

police court judges in first and second class cities and all others forms the basis for appellant's equal protection challenge on pp. 31, *infra*.

(e) THE QUESTIONS ARE SUBSTANTIAL

I. THE SUPREME COURT SHOULD REVIEW THIS CASE BECAUSE OF THE BROAD PUBLIC QUESTIONS INVOLVED.

A. The Questions in This Appeal Affect the Administration of Criminal Justice in Many States.

The questions presented in this appeal have a far-reaching significance for the administration of criminal justice in the numerous states that invest lay judges with the power of adjudication and punishment of misdemeanants. Appellant's federal constitutional challenges to the capacity and ability of Judge Russell to conduct an orderly and fair criminal trial in which the punishment imposed was fine, imprisonment, and the collateral consequences of conviction, strike to the heart of the woefully inadequate quality of justice meted out in inferior tribunals presided over by unqualified judges. Although focused on the capacity of one particular lay judge, this case squarely raises basic questions affecting minimum standards of justice and the day-to-day operation of the criminal justice system on the level most closely in touch with the average citizen. This level of courts, appropriately labeled "inferior", has virtually escaped constitutional scrutiny due to a variety of historical and institutional factors.

Among many scholarly observers, former Chief Justice of the California Supreme Court, Roger Traynor, has recognized the importance of the inferior court system:

> "Trial courts of limited jurisdiction, including justice of the peace courts, have unlimited capacity to affect public attitudes toward law for better or worse. It is these courts, not the appellate courts, that the people generally know first hand. What they observe there of justice or injustice, of efficiency or bumbling, determines whether they will look upon the courts with respect and pride or cynicism". Traynor, Rising Standards of Courts and Judges, 40 Calif. S.B.J. 677, 688 (1965).

In *Mayer* v. *Chicago*, 404 U.S. 189 (1971), this Court observed that "'Justice, if it can be measured, must be measured by the experience the average citizen has with the police and lower courts'." *Id. at* 197. As the most independent and unsupervised member of the judicial system, the lay judge occupies a unique and important position at the vanguard of our system of criminal justice. In many states,[11] including Kentucky, the lay judge is entrusted with such various complex and crucial responsibilities as issuing search warrants, conducting preliminary hearings in felony cases, setting bail in felony cases, and, ultimately, presiding over jury and non-jury trials in misdemeanor cases. The arbitrary brand of justice dispensed by most lay judges is legendary and has been roundly criticized over the years by a host of eminent commentators, many of whom have concluded that the performance of lay judges inevitably engenders disrespect for the judicial system. As the cutting edge in a broader movement for judicial

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11. New York University, The Institute of Judicial Administration, The Justice of the Peace Today, 1965, Supplemented 1973.

reform, these commentators have been nearly unanimous in recommending the abolition of lay tribunals, particularly in criminal matters. See *e.g., The President's Commission on Law Enforcement and Administration of Justice, Task Force Reports: The Courts* 36 (1967); Dolan & Fenton. *Justice of the Peace in Nebraska,* 48 Neb. L. Rev. 457 (1969); Vanderbilt, *The Municipal Court in New Jersey,* 10 Rut. L. Rev. 647 (1956); Zimmerman, *Justice of the Peace Courts,* 21 Ore. L. Rev. 380 (1942); Smith, *The Justice of the Peace System,* 15 Cal. L. Rev. 118 (1927).

B. The Questions in This Appeal Affect the Administration of Criminal Justice to Tens of Thousands of Kentucky Citizens.

Current figures are not available relating to case distribution throughout various courts of Kentucky. Research Report No. 39 of the Kentucky Legislative Research Commission, Frankfort, Kentucky, dated September, 1967, entitled, "County Judges and Justices, Some Aspects of Case Loads", shows that in fiscal year 1966-67, fines and forfeitures in these two inferior courts in Kentucky were imposed in 93,338 penal and misdemeanor cases. During that period, fines in 84,838 of the cases were imposed by County Judges (who are not required by law to have legal training), while 8,500 such cases were tried by Justices of the Peace (who are required to have no legal training). Every County Judge in Kentucky's 120 counties had a criminal case load.

Although data is not available in statistical form relating to criminal case loads in city police courts throughout the state, it would seem clear that tens of thousands

of penal and misdemeanor cases are also being handled annually by such courts throughout Kentucky in every class of city. Independent research by University of Kentucky law students for the undersigned (telephone poll of the various 120 counties, September, 1974), shows there are 853 lay judges currently vested with criminal jurisdiction in Kentucky. For a breakdown of lay versus attorney judges in inferior courts in Kentucky, see Appendix 6, Page 30a.

C. This Court Should Resolve the Conflict Between the Decision Rendered by the Supreme Court of the State of California in Gordon v. The Justice Court for the Judicial District of Sutter County and the Decision Rendered by the Court of Appeals of Kentucky in This Case.

The Supreme Court of California in *California* v. *Gordon,* 525 P.2d 72 (Cal. 1974), *cert. denied,* 43 U.S. L.W. 3448 (U.S. Feb. 18, 1975), considered the due process issues raised on this appeal. In that case, the California Court decided unanimously that the current practice of allowing non-attorney judges to preside over criminal trials of offenses punishable by a jail sentence violated the constitutional rights of the defendants in those proceedings as guaranteed to them under the due process clause of the Fourteenth Amendment of the United States Constitution. In so ruling, the California Court mandated that all judges presiding over criminal proceedings involving charges which carry the possibility of a jail sentence must be licensed attorneys, unless the defendant or his counsel waive such requirement. In a comprehensive decision, dealing both with the history of the justice of the peace

court system and with the developing complexities of criminal trials, the Court held: "Since our legal system regards denial of counsel as a denial of fundamental fairness, it logically follows that the failure to provide a judge qualified to comprehend and utilize counsel's legal arguments likewise must be considered a denial of due process". The California Court, considering a lay judge system which required passage of a written examination before assuming trial of cases (Kentucky has no requirements) found even in the absence of an actual trial or conviction or a showing of actual prejudice, that the system could not withstand a Fourteenth Amendment due process attack.

In its decision, the California Court rejected the holding of the Court of Appeals of Kentucky in *Ditty* v. *Hampton*, supra, stating that the *Ditty* case, and two other state court cases, did not "convincingly [resolve] the inherent inconsistency in guaranteeing a defendant an attorney to represent him without providing an attorney-judge to preside at the hearings. As we have seen, a defendant's right to a fair trial may be substantially abridged by the use of a non-attorney judges". In contrast to the holding of the California Court in *Gordon*, the Kentucky Court of Appeals in *Ditty* decided that "there has never been any thought (by the Supreme Court of the United States) that a right to be tried by a lawyer grows out of the right to be defended by a lawyer", 490 S.W. 2d at 774.

With two conflicting state high court rulings on substantially identical constitutional issues now in effect, it is important that this Court resolve the anomalous situation whereby the citizens of California are living under one interpretation of the due process clause of the Fourteenth Amendment and the citizens of Kentucky under another. Only this Court can resolve this conflict and bring uniformity to the meaning of the Fourteenth Amendment as it relates to legally untrained judges. This reason alone is a compelling reason for this Court to note jurisdiction either upon this appeal or upon *certiorari*.

In this regard, this Court has previously held that the grant of *certiorari* is proper in certain important cases:

(1) Where a federal statute has received conflicting construction by the highest courts of two different states, *United States* v. *Oregon*, 366 U.S. 643 (1961);

(2) Where the case raised important questions, not only to the state involved but to other states having similar laws, *McGhee* v. *International Life Insurance Company*, 355 U.S. 220 (1957);

(3) Where the case draws into question the constitutionality of a statute in force in several other states, *New York* v. *O'Neill*, 359 U.S. 1 (1958).

II. THE ISSUES INVOLVED IN THIS CASE RAISE SUBSTANTIAL FEDERAL QUESTIONS UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES TO THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHICH SHOULD BE REVIEWED.

A. The Kentucky Police Court Scheme is Repugnant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

As the structure of the Kentucky police court system

described above reveals, whether an accused stands trial before a lay judge or an attorney judge depends on his whereabouts. If a person is charged with a misdemeanor in Lexington, Kentucky, a second class city, he is accorded a judge required by statute to be a lawyer. If the same person were charged with the same misdemeanor 18 miles away in Paris, Kentucky, a fourth class city, he might be compelled to stand trial before a lay judge. Yet jurisdiction is conferred upon both courts by the same statute, KRS § 26.010; both courts bear the same name; and both courts have the same territorial and other jurisdiction. The historical antecedents of this scheme, in days when means of transportation and communication were not as sophisticated, perhaps justified a differential treatment. But, in 1974, such a system finds little practical justification. In the *Ditty* case, supra, the legislative justification was said to be:

> " 1. The greater volume of court business in the larger cities requires that judges be attorneys to enable the courts to operate efficiently and expeditiously (not necessarily with more fairness and impartiality).
>
> 2. Lawyers with whom to staff the courts are more available in the larger cities.
>
> 3. The larger cities have greater financial resources with which to provide better qualified personnel and better facilities for the courts. Cf. Metcalf v. Howard, 304 Ky. 498, 201 S.W.2d 197."

A close analysis of the Kentucky police court scheme reveals an arbitrary and irrational plan which the legislature has fashioned to achieve some vague but unsanctioned

purpose. By requiring lawyer judges in first and second class cities, in obvious recognition of their superior ability to function in a judicial capacity (implicitly recognized by the Court of Appeals in *Ditty*) the legislature has established classifications affecting the fundamental right of criminal defendants to a fair trial without consideration of the most important fact that could conceivably justify such classifications—i.e., the actual number of attorneys in a given area who are qualified to serve as police judges. Consequently, in premising the police court scheme solely on a population basis and without consideration of the actual number of attorneys in a given city or in a given area[12] (e.g. a larger population center with an abundance of attorneys may be close enough to supply outlying areas with the necessary judicial manpower), the Kentucky legislature has established an overinclusive classification burdensome to those criminal defendants who are brought to courts in areas where attorney judges are available to try misdemeanor cases.

In light of the unequal treatment accorded criminal defendants by the Kentucky police court scheme, appellant submits that, under standards applied by this Court to test the compatibility of burdensome legislative classifications with the equal protection clause, this arrangement must be invalidated upon the following considerations:

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12. Harlan County has 22 practicing lawyers, Martindale-Hubbell, Law Directory.

(1) The Kentucky Police Court Scheme Impinges on Appellant's Fundamental Right to a Fair Trial and Cannot be Justified as Necessary to the Achievement of a Compelling State Interest.

In a variety of cases the Court has applied an exacting standard of precision to statutory classifications affecting *fundamental* constitutional rights of individuals. In these cases, the Court has placed a heavy burden on the state to demonstrate that, (a) such laws are "necessary to promote a compelling state interest", *Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969), and (b) that the means chosen by the state in pursuing even very substantial interests are the least restrictive methods of achieving the asserted goals of the legislation. *Id. at* 631. See *Dunn* v. *Blumstein*, 405 U.S. 330, 342 (1972). By thus requiring states to carefully tailor discriminatory classifications, the Court has extended the host of constitutional rights to *all* citizens within a state, not merely those favored by imprecisely drawn classifications which are often based on outmoded facts and theories having little, if any, justification in modern times. When measured again the demanding standard of Fourteenth Amendment equal protection, this Kentucky police court scheme cannot stand.

a. The Impingement

As a threshold consideration, it is clear that the statutory scheme permitting uninformed judges to try criminal cases impinges upon a defendant's fundamental right to a fair trial, *California* v. *Gordon*, supra. As discussed more fully below, the lay judge's ignorance of the basic constitutional protections essential to a fair trial—in this regard, it is important to note that most of the

explicit protections of the first ten amendment relate to the trial stage—inherently prejudices and burdens a defendant's right to a fair trial, called in *Estes* v. *Texas*, 381 U.S. 532, 540 (1965), "the most fundamental of all freedoms" and *In re Murchison*, 349 U.S. 133, 136 (1955), "a basic requirement of due process".[13] By definition, a fair trial can only be realized when the rules and limitations governing the trial are recognized and studiously honored. These rules and limitations serve as a necessary precondition to our concept of a fair trial. Without their recognition and knowledgeable interpretation and application by the judge, whose distinct role it is to assure the defendant a fair trial consistent with these established safguards, a fair trial is an impossibility.[14] This case is one monument to that fact.

A criminal trial, even in a misdemeanor case, involves the writing of a charge; fixing of bail; giving notice of the charge; making appropriate provisions for counsel; summoning a jury; empaneling a jury in accordance with technical legal standards; observing very technical and

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13. This Court has recognized that the right to a fair trial is guaranteed in trial courts at all levels and that a "State's trial court procedure [cannot] be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication." Ward v. Village of Monroeville, 409 U.S. 57, 61 (1972).

14. In its most recent decision in this case the Kentucky Court said: "We fully appreciate the absurdity of having a lawsuit—any lawsuit—presided over in this day and age by a person without legal training or experience", Appendix 1, Page 4a-5a.

precise procedural and substantive rules, both codified and uncodified, relating to the order of the hearing, reception of evidence, handling of motions, instructing the jury, and receiving and enforcing a verdict; and the many and varied rules, both procedural and substantive relating to post-trial proceedings and appeals. Rules relating to this criminal process are found in codes of procedure, statutes, state and federal constitutions, and in a great body of common law related by court decisions. Every state has recognized the technical nature of this process and the extensive learning required to master it, and has imposed license standards upon any person who would practice the legal arts.

In this context, Lonnie North found himself charged with a crime and facing loss of his liberty. His trial was programed by the State and Federal Constitutions and by the procedural and substantive rules of law of Kentucky to be both fair and orderly, if, indeed, the program was followed. Unfortunately, there is in Kentucky's criminal processes a kind of legal hypocrisy which emptied the system of all of these protections by introducing into North's trial a judge who knows nothing at all about the procedure rules, much less the various procedural and substantive rights accorded North as a citizen of Kentucky and of the United States. Who can read the transcript in the trial court, (Appendix 5), without concern for the incredible incompentency of Judge Russell whose judicial authority is sanctioned by the very statutes which we now challenge? And who can but feel sympathy and empathetic indigation at the shameful way in which North was accorded the most fundamental of his civil rights—the right to a fair and orderly trial?

b. The Justifications

Once it is concluded that a *fundamental* constitutional guarantee is diluted by the operation of the Kentucky statutory scheme, the state must demonstrate that the classifications are necessary to the ahievement of a compelling state interest, *Shapiro* v. *Thompson,* supra. In light of the three reasons offered by the Kentucky Court of Appeals in *Ditty* v. *Hampton,* supra, as the justification for these provisions, no such showing is made: First, logic and experience may sustain the court's proposition that "the greater volume of court business in the larger cities requires that judges be attorneys to enable the courts to operate efficiently and expeditiously". But, if it is the denial of the right to a fair trial that is in question, this justification is meaningless. It certainly is no reason for depriving one group of citizens of the benefits resulting from such efficiency and expedition. It is well recognized, moreover, that "the Constitution recognizes higher values than speed and efficiency". *Stanley* v. *Illinois,* 405 U.S. 645, 656 (1972); second, the assertion that "lawyers with whom to staff the courts are more available in the larger cities", while perhaps compelling eighty years ago, cannot stand as even reasonable in 1974, when transportation capabilities and lawyer density patterns reveal that there is more than sufficient legal manpower to staff the courts. (See Martindale-Hubbell Law Directory, showing lawyer distribution patterns in Kentucky.) Belying this justification is the theoretical provision of counsel, as required by *Argersinger* v. *Hamlin,* 407 U.S. 25 (1972), to all criminal defendants in even the most remote courtrooms in Ken-

utcky.[15] Moreover, to further its interests, the state has available to it alternative, "less drastic means", which recognize the rural-urban disparity in legal manpower but still advance the state's objectives. For example, the state might follow the federal lead in requiring bar membership for inferior court judges—magistrates, in the federal system—unless there is a demonstrable showing that no attorney is available in the particular locale (28 U.S.C. Section 631(b)) or in permitting an accused to elect to stand trial before an attorney judge in a higher court (18 U.S.C. section 3401 (b)); third, the notion that "the larger cities have greater financial resources with which to provide better qualified personnel and better facilities for the courts" is an obviously insubstantial consideration under the strict scrutiny test. See *Shapiro* v. *Thompson*, supra. If financial resources available in a particular area is to be a justifiable standard of approved fairness in a criminal trial, then we place a price tag on our fundamental freedoms—an intolerable concept.

Thus, it is clear that the classification cannot be sustained under the "compelling state interest" test, nor, as we will see, can it be sustained under the less restrictive "rational basis" test.

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15. Implementation of Argersinger in lay courts is often more theoretical than real, as any outland lawyer will attest.

(2) The Kentucky Police Court Scheme Establishes Classifications on the Basis of Criteria Wholly Unrelated to the Objectives of the Statutes and Therefore Violates the Equal Protection Clause of the Fourteenth Amendment.

a. The Classifications and Their Objectives

Under the less restrictive scrutiny standard articulated by this Court on numerous occasions, the Kentucky Police Court scheme is untenable. In *Reed* v. *Reed*, 404 U.S. 71 (1971), where a unanimous Court invalidated an Idaho probate provision giving men mandatory preference over women when persons of the same priority class applied for appointment to administer a decedent's estate, Chief Justice Burger articulated the now applicable standard for such differential treatment:

> "In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to the states the power to treat different classes of persons in different ways. The Equal Protection clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of the statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike'. *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920)". 404 U.S. at 75-76 (citations omitted). See *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972).

Under this standard, the constitutionality of the Kentucky scheme depends on whether the population criteria which is the basis of the challenged classifications substantially advance the legislative purposes of the statutes. Appellant submits that they do not in any rationally justifiable way. The main objective of the Kentucky legislature, as inferred from the three reasons divined by the Kentucky Court of Appeals in *Ditty*, supra, appears to be a justifiable *relaxation of standards of juicial competence* in rural areas where, because of population, the number of lawyers are presumed to be scarce. Yet, as we have seen, there is no necessarily consistent or rational correlation between the class city and the number of lawyers practicing therein. Moreover, even the small number of lawyers in many lower class cities are sufficient to handle the small amount of judicial business transacted in those cities.

Again the differential treatment is attributed by the Court of Appeals to docket considerations, the court inferring from the legislation that, because of the greater case loads in urban areas lawyer judges are required to promote efficiency and expedition of the case load. This seems a slight basis upon which to excuse a disriminatory practice. If appellant's court experience is any indication, Judge Russell's disposition of criminal charges is both efficient and expeditious.

Finally, the court inferred from the legislation that another objective of the Kentucky Legislature was to require lawyer judges in urban counties, where money is available to pay them, but to require no such judges in those smaller towns where the cities presumably could not afford a lawyer judge. To group all lower-population cities in this

fiscal category is, on its face, over-inclusive and conjectural.

(3) Recent Rulings

In recent years. this Court has had several occasions to rule upon state action which discriminates against one class of its citizens in a way which deprives that class of some right or immunity guaranteed to them under the Fourteenth Amendment to the United States Constitution, *e.g.*, *Williams* v. *Illinois*, 399 U.S. 235 (1970); *Tate* v. *Short*, 401 U.S 395 (1971); *Mayer* v. *Chicago*, 404 US. 189 (1971); *Eisenstadt* v *Baird*, 405 U.S. 438 (1972); *Reed* v. *Reed*, 404 U.S. 71 (1971); *Moore* v. *Ogilvie*, 394 U.S. 814 (1969); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Baxstrom* v. *Herold*, 383 U.S. 107 (1966).

Applying these and other decisions to this case, it must be said that:

, (1) Kentucky's statutory scheme discriminates against persons standing trial in small towns by providing to them judges of inferior capacity and competency while providing persons similarly situated in urban areas with judges of superior competency.

(2) This discrimination is burdensome to the fundamental rights of such persons to a fair trial.

(3) There is no compelling state interest in providing such citizens with anything other than a competent judge and a fair hearing.

(4)„The objectives, purposes, and reasons for the discrimination conjectured by the Court of Appeals (fiscal consideration, availability of lawyers, and docket de-

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mands) are no justification for the differential treatment accorded the differing classes. The differential treatment by class is patently overinclusive and the reasons advanced for such differential treatment will not withstand the court's requirement of reasonableness.

In consideration of the foregoing this Court should note probable jurisdiction.

B. Trial by a Lay Judge Devoid of Knowledge or Understanding of the Substantive and Procedural Law Essential to a Fair Trial Violates the Due Process Clause of the Fourteenth Amendment.

(1) Due Process of Law Comprehends the Right in a Criminal Trial to a Judge With Knowledge and Understanding of the Substantive and Procedural Law Essential to a Fair Trial.

Law, by nature, is technical and complex. Because of the ultimate stakes invloved, the criminal law, in particular, has evolved into a panoply of rules and procedures, often containing subtle distinctions, which must be applied to the unique facts of a particular case with diligence and sensitivity by the presiding judge. Even in so-called minor or petty offenses this Court has recognized that the "legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are [no] less complex than when a person can be sent off for six months or more". *Argersinger* v. *Hamlin*, 407 U.S. 25, 33 (1972).

Without schooling in the fundamentals of legal analysis and reasoning, an untrained and unversed judge in-

evitably decides each case on the basis of uninformed discretion, which "however benevolently motivated, is . . . a poor substitute for principal and procedure." *In re Gault*, 387 U.S. 1, 18 (1967) (condemning the lack of legal expertise on the part of lay juvenile judges). Exercising "common sense", the judge turns the rule of law, integral to the preservation of society, into rule by fiat and whimsy. Dean Roscoe Pound has trenchantly observed how typical lay judges irresistably make a mockery of justice:

> "With no training in the law, no training in the process of judicial thought, and no mental habit of mind acquired by constant experience in legal reasoning, it would indeed be strange if a [lay judge] did not treat each case as a unique proposition. He has no category or class into which he may place it, no analogies from which to draw to solve the new problem before him. He has no legal rules, principles or standards by which to judge the merits of the controversy to be decided. Wholly unlike the judge who is trained in the law, he has no precedents to guide him. In deciding the cause before him the lay judge is necessarily limited by his own personal experience acquired in the short span of a single lifetime. He cannot call on the legal experience of the ages to assist him but is helpless to any more than apply his own personal notions of right and wrong to the case at hand. The justice which such tribunal is capable of dispensing is but the outcropping of the experiences of a personality, often limited and warped by passion and prejudice, and at best, as variable as the personalities of the justices who comprise [the sys-

> tem] . . . Such justice is not justice at all. It is unequal, uncertain and capricious". R. Pound, Outlines of Lectures on Jurisprudence 75 (3d ed. 1963).

Stated most simply, the reality of the archiac system challenged in this case cannot comport with the demands of modern-day justice.

On many occasions, this Court has described the overwhelming difficulties any layman faces when confronted with the complexities of the law in the context of a criminal proceeding. In *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), for example, the Court stated the obvious truth: "That which is simple, orderly and necessary to the lawyer to the untrained layman may appear intricate, complex, mysterious." *Id. at* 462-63. Perhaps the most persuasive line of cases supporting the concept of a legally knowledgeable tribunal as a necessary component of a fair trial are those cases articulating and extending the right to counsel in criminal cases. Inherent in the holdings of *Powell* v. *Alabama*, 287 U.S. 45 (1932); *Gideon* v. *Wainwright*, 372 U.S. 342 (1963); and *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972) is the inexorable corrollary that the defendant's right to counsel and to a fair trial includes, both on *sixth* and *fourteenth* amendment grounds, the right to a judge who is mentally equipped to comprehend the arguments of counsel and to conduct a trial in a manner most conducive to the emergence of truth. These cases explicitly recognize the competence only a lawyer can bring to the defense of an accused and the fair application of the law, and emphasize, however implicitly, that counsel and the court must complement each other to insure the proper funtioning of our adversary system of

justice. See generally *D. Peck, The Complement of Court and Counsel* (1954).

The foregoing analysis suggests the importance of the due process issue presented in this case to the rational administration of criminal justice. Without repeating the due process formulas cited by the Kentucky Court of Appeals in *Ditty* v. *Hampton, supra,* appellant submits that the concept of a fair trial under the Fourteenth Amendment includes the right of a criminal defendant to be tried by a judge knowledgeable of the relevant law and able to comprehend counsel. Absent such a minimally competent judge, the entire foundation of our adversary system is impaired, for the procedural and substantive safeguards designed to assure a fair trial are ignored, or at best, ineptly applied. See Traynor, *Rising Standards of Courts and Judges,* 40 Calif. S.B.J. 677, 690 (1955) ("The finest tools may still botch a job in the hands of an inept carpenter"). If the concept of *ordered* liberty, *Palko* v. *Connecticut,* 302 U.S. 319, 325 (1938), is to have any meaning, it must include recognition by the expositors of the law of the basic guarantees underlying our system of justice. This recognition and accompanying expertise, "the keystone of the whole venture", *In re Gault,* 387 U.S. 1, 14 n. 14 (1967), is markedly absent in the inferior courts of Kentucky and, according to most commentators, in the lower courts of other states. With the implementation of *Argersinger* v. *Hamlin,* 407 U.S. 25 (1972), extending the right to counsel in misdemeanor cases, nearly complete in most states, the time is ripe for this Court to insure that the *Argersinger* mandated lawyers will be

practicing in courts that are capable of affording a fair trial to all criminal defendants.

The facts in this case conclusively show that Judge Russell was utterly incapable of affording a fair trial to Lonnie North or, for that matter, to any criminal defendant. Without any legal training, Judge Russell was totally ill-equipped to comprehend the rules of evidence or the applicable rules of criminal procedure. Even if he desired to educate himself in particular cases, his sources of independent information were few. Even more revealing is Judge Russell's candid admission that he is virtually unfamiliar with the Bill of Rights and their interpretation by this Court in criminal cases and only nominally familiar with State criminal law. With this meager background, Judge Russell exercised in Lonnie North's case the kind of unfettered discretion antithetical to the concept of *ordered* liberty implicit in our notion of a fair trial. Without rules and principles as touchstones to decision, due process is simply nonexistent in Judge Russell's courtroom.

The appellant in the state court alleged and argued the unconstitutionality of KRS § 26.200, contending that that statute, fixing the qualifications of police court judges in cities of the fifth and sixth classes, is invalid under the due process clause of the Fourteenth Amendment to the Constitution of the United States for the reason that it subjects him to trial in a criminal court before a judge who has not the competency, capacity, knowledge and understanding of his procedural and substantive rights, so as to accord to the appellant those rights secured to him by the Constitution and laws of Kentucky and by the Constitution of the United States of America. He also alleged and argued in the lower court that trial, conviction, and incarceration of him by Judge Russell in the Lynch Police Court, so constituted, deprived him of the due process of law as guaranteed to him under the United States Constitution. It is submitted that this Court ought to note jurisdiction on both of these issues by extending a full hearing on his appeal and/or grant of the discretionary writ of *certiorari*.

(2) A Criminal Trial Presided Over by a Lay Judge Who, Because of His Ignorance of the Law is Totally Dependent Upon the Prosecutor for Legal Advice, Involves Such Prejudice That it is Inherently Lacking in Due Process.

The transcript depicting the trial of Lonnie North by Judge Russell is a stark example of the prejudice encountered by a criminal defendant when tried by a lay judge. The North "trial", however, cannot be singled out as unusual. The probability of an unfair hearing pervades Judge Russell's courtroom and, consistent with the Constitution, he should not be permitted to sit in criminal cases because of the inherent probability that all criminal defendants facing trial in his court will be prejudiced in their ability to obtain a fair and impartial hearing.

In invalidating the televising of the courtroom proceedings in a criminal trial as repugnant to the fundamental right to a fair trial guaranteed by the fourteenth amendment, this Court in *Estes* v. *Texas*, 381 U.S. 534 situations where the probability of prejudice infecting a trial can be presumed: "It is true that in most cases involving claims of due process deprivations we re-

quire a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the state involves such a probability that prejudice will result that it is deemed inherently lacking in due process". *Id. at* 542-43. See *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966); See *Ward* v. *Village of Monroeville,* 409 U.S. 57 (1972); *Rideau* v. *Louisiana,* 373 U.S. 723 (1963); In *re Murchison,* 349 U.S. 133 (1955); *Tumey* v. *Ohio,* 273 U.S. 510 (1927). In many other instances, this Court has promulgated a prophylactic rule of unconstitutionality in an endeavor to prevent even the possibility of unfairness in criminal proceedings. See *North Carolina* v. *Pearce,* 395 U.S. 711 (1969); *Bruton* v. *United States,* 391 U.S. 123 (1968); *Miranda* v. *Arizona,* 384 U.S. 436 (1966); *Jackson* v. *Denno,* 378 U.S. 368 (1964).

Another reason for this Court to disqualify Judge Russell, on Fourteenth Amendment's grounds, from presiding in criminal cases is the direct relationship between Judge Russell's lack of legal knowledge and his necessary reliance on the city attorney—in effect, the prosecutor—for all legal advice. In *Tumey* v. *Ohio,* 273 U.S. 510 (1926), the Court set a rigid standard in cases where a trial judge may even possibly be tempted to overlook the competing claims of the prosecution and the defense. *"Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denied the latter due process of law". Id. at* 532 (emphasis added). See *Ward* v. *Village of Monroeville,* 409 U.S. 57, 60 (1972). Given the probabilities of prejudice and unfairness inherent in trial by a lay judge it is important for this Court to decide whether a rule of unconstitutionality should be applied to invalidate the practice of trial by judges incapable of holding "the balance nice, clear and true between the state and the accused".

(3) The Standards Set Forth in Shadwick v. City of Tampa, 407 U.S. 345 (1972), Support Appellants Right to be Tried Before a Competent Judge.

Shadwick v. *City of Tampa,* 407 U.S. 345 (1972), holds that a state may constitutionally empower a lay individual to perform judicial functions. That case, of course, upheld a Florida law by which court clerks, who were not attorneys, were empowered to issue warrants of arrest and to make determinations of probable cause for the issuance of such warrants.

In that case, this Court laid down a rather exacting standard in connection with the issuance of warrants by lay persons upon the showing of probable cause. In that case, the Court stated, (407 U.S. 345 at 350):

> "Thus an issuing magistrate must meet two tests. He must be neutral and detached and he must be capable of determining whether probable cause exists for the requested arrest or search."

This Court went further and said:

> "If, on the other hand, detachment and capacity do co-join, the magistrate has satisfied the Fourth Amendment's purpose."

Thus, even in connection with so simple a legal judgment as probable cause, this Court has required that the official making the legal determination of probable cause have the capability of making such determination. The holding in the *Shadwick* case is of considerable comfort to appellant, North, because the Court in that case made it very clear that a person exercising judicial functions in criminal cases must have the capacity to make considered legal judgments.

Of course, the appellant in the *Shadwick* case failed to show by any evidence that the clerk which issued the warrant in question was not capable of making a legal judgment as to whether probable cause for issuing the warrant existed. In this case, the Transcript of Evidence (Appellant's Jurisdictional Statement, Appendix 5, page 16a) very clearly demonstrates that Judge Russell was empowered to perform judicial functions which he was totally incapable by training, knowldege and experience to perform.

CONCLUSION

Any decision as to whether this Court should note probable jurisdiction and direct plenary hearing of this case on the merits will, no doubt, involve the following considerations:

(a) Should an untrained judge's competency and capacity to preside in a criminal trial involving the possible loss of liberty be a subject of due process inquiry on a case-by-case basis?

(b) Should minimal due process qualifications relating to judicial capacity and competency be defined by this Court?

(c) How should differential treatment of accused misdemeanants in regard to qualifications of presiding judges be dealt with?

(d) Should a *per se* rule of unconsitutionality be considered, as in the *Gordon* case, supra?

In connection with the above considerations, it is submitted that the criminal processes in every State in the Union investing untrained judges with trial jurisdiction in criminal cases are involved in this appeal and that those processes require attention from this Court in the interest of the uniform administration of criminal justice among the 50 states.

We respectfully urge this Court to note probable juris-

diction on all issues advanced in this Statement and to order plenary consideration of this case.

Respectfully submitted,

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OF COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Jurisdictional Statement and Appendix were served upon Honorable Wix Unthank, Commonwealth Attorney, Harlan, Kentucky 40831, Attorney of Record for Appellees, C. B. Russell and Nathaniel "Trap" Helton, and upon Honorable Ed W. Hancock, Attorney General, Commonwealth of Kentucky, Frankfort, Kentucky 40601, by mailing same, postage prepaid, on this 5th day of May, 1975.

Charles E. Goss

CHARLES E. GOSS

APPENDIX

APPENDIX 1

Rendered: March 21, 1975

COURT OF APPEALS OF KENTUCKY

74-723

LONNIE NORTH .....*Appellant*

V. APPEAL FROM HARLAN CIRCUIT COURT
HON. EDWARD G. HILL, JUDGE
CIVIL ACTION NO. 2093

C. B. RUSSELL; NATHANIEL
"TRAP" HELTON, Harlan
County Jailer .....*Appellees*

OPINION OF THE COURT BY JUSTICE PALMORE
AFFIRMING

This proceeding began with a petition for habeas corpus filed in the Harlan Circuit Court by the appellant, Lonnie North, against the appellees, C. B. Russell, police judge of the City of Lynch, and Nathaniel "Trap" Helton, jailer of Harlan County. North alleged that he was being detained in the county jail pursuant to a judgment of the police court finding him guilty of drunk driving[1] and fixing

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1. KRS 189.520

2. KRS 189.990(10)(a).

APPENDIX 1

his punishment at 30 days in jail and a fine of $150.[3] Entitlement to relief by way of habeas corpus was asserted on the theory that because the statute prescribing the qualification of police judges in fifth and sixth-class cities[3] do not require any legal training or knowledge, and because Judge Russell is a "lay" judge, unlearned in the law, the action or judgment by which North was committed to jail violated his rights of due process and equal protection of the laws under the 14th Amendment and was void.

Though sympathetic to North's constitutional argument, the trial court relied upon *Ditty* v. *Hampton,* Ky., 490 SW 2d 772 (1973), in denying relief, and the judgment was affirmed by this court in *North* v. *Russell,* Ky., 516 SW 2d 103 (1974). North then appealed to the United States Supreme Court.

In response to a jurisdictional statement and brief filed in the Supreme Court by North the Attorney-General of Kentucky filed a motion to dismiss or affirm in which the following footnote appeared:

> "The uncontested facts of this case establish that appellant requested but was denied a jury trial. Under Kentucky law he was entitled to the jury trial he requested. KRS 26.400(4). Further it appears that Judge Russell mistakenly imposed a sentence of imprisonment upon appellant for a first offense of driving while intoxicated, whereas imprisonment is not an authorized punishment for first offenders but can be imposed only upon commission of subsequent offense. KRS 189.990(10)(a). Accordingly appellee must concede that appellant should have been granted the writ of habeas corpus for which he filed. However, appellant has never requested that a Kentucky Court grant him relief to which he is entitled under Kentucky law, but has on the contrary consistently demanded that he be granted a writ of habeas corpus on the ground that the Kentucky police court system is in violation of the U. S. Constitution. It is appellee's position that even should this Court note probable jurisdiction over the constitutional issues which appellant raises, it should nonetheless refrain from deciding the federal questions involved in this case and remand the case to the Kentucky Court of Appeals for that Court's consideration of whether or not appellant should be granted a writ of habeas corpus solely upon the basis of violations of Kentucky law which occurred in the course of appellant's trial before the Lynch Police Court."[4]

On the basis of this footnote the Supreme Court has vacated our judgment in *North* v. *Russell,* supra, and re-

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3. KRS 26.200.

APPENDIX 1

4. Since there is no official record of the proceedings in the Lynch Police Court, the Attorney General's understanding that the alleged offense was the appellant's first appears to be an assumption. It is neither alleged nor conceded to be a fact.

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manded the case "for further consideration in light of the position presently asserted by the Commonwealth," to the utter consternation of the appellant, who of course is interested only in the constitutional issue and vigorously contests the suggestion that he be graned relief on another and less spectacular ground. The result is that we find ourselves performing an unwilling and not altogether felicitous role in a judicial fan dance.

Appellate courts have more to do than deal with errors of which appealing parties make no complaint. It is elementary that errors of which an aggrieved party is perfectly well aware but which he chooses not to bring to the attention of the court are waived. The blunt fact is that this appellant wants only to test the constitutional status of lay judges in criminal cases, whereas the Attorney-General has no appetite for that particular field of battle.

We fully appreciate the absurdity of having a lawsuit—any lawsuit—presided over in this day and age by a person without legal training or experience. Nevertheless, it was our conclusion in *Ditty* v. *Hampton*, Ky., 490 SW 2d 772 (1973), that the federal constitution does not deny the people the right to have it that way if they so desire. Moreover, when this habeas corpus proceeding began and when it was decided in this court there was still time in which the appellant could have secured a trial *de novo* in the Harlan Circuit Court by the simple expedient of an appeal from the judgment of the Lynch Police Court.

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KRS 23.032; RCr 12.02—12.06, incl. Cf. *Colten* v. *Kentucky*, 407 U.S. 104,112 (1972)

The constitutional issue was and is the only issue before us, and we have decided it adversely to the appellant. So again, the judgment is affirmed.

All concur.

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APPENDIX 2

HARLAN CIRCUIT COURT

LONNIE NORTH .....*Petitioner*

VS. PETITION FOR WRIT OF HABEAS CORPUS

C. B. RUSSELL, NATHANIEL
"TRAP" HELTON, Jailer of
Harlan County .....*Respondents*

(1) The Petitioner, Lonnie North, being first duly sworn, represents to the Court that he has been and is being detained by the Jailer of Harlan County, Kentucky, Nathaniel "Trap" Helton, in the Harlan County Jail under the order and judgment of the Respondent, C. B. Russell, Lynch City Court Judge, without lawful authority, the pretended cause of such imprisonment being as follows:

> "On or about Wednesday, July 10, 1974, the Petitioner was detained by the Chief of Police at Lynch, Kentucky, whose name is unknown to the Petitioner and held in the City of Lynch, Kentucky for the arrival of the Cumberland City Police; whereupon the Petitioner was taken from the City of Lynch by Chuck Hollitt to the City of Cumberland, Kentucky, a separate municipal entity, and cited by the said Cumberland City Police upon a charge of reckless driving; whereupon the Petitioner returned to his home at Lynch, Kentucky. Shortly

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thereafter, the Petitioner received a telephone call from the Lynch City Police directing him to come to the Lynch City Hall to remove the motorcycle upon which the Petitioner was riding at the time that he was detained by Lynch City Police; whereupon the Petitioner traveled to the Lynch City Hall in company with his brother, Ronald North, and his Father, Eli North, for the purpose of assuming possession of the motorcycle; whereupon, a Lynch City Policeman known only as "Potter", whose full and true name is unknown to the Petitioner, directed the Petitioner to Lynch City Hall and cited the Petitioner accusing him of the crime of driving while intoxicated; whereupon, the Petitioner was immediately admitted to bail and returned to his home at Lynch, Kentucky under directions from the said "Potter" to return to City Hall on Thursday, July 18, 1974, at the hour of 8:00 P.M.; whereupon, the Petitioner appeared at the City Hall at the appointed time and place before the Respondent, C. B. Russell who, in the presence of Eli North, Terry Creech, and Hal Woods, called for the Petitioner's plea to the charge of driving while intoxicated, with the Petitioner responding, "Not Guilty". Whereupon, in the presence of the aforesaid witnesses, the Respondent, C. B. Russell, stated, "I will give you a jury trial if it takes all damn night". Then he left the room and was gone about ten minutes. He came back and said, "I have talked to a lawyer and we don't need no jury, I am going to try you

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myself. I fine you $150.00, suspend your operator's license and give you 30 days in County Jail". Whereupon he said, "Where are the Police". Upon arrival of the police, the said Respondent, C. B. Russell, handed the said city police a slip of paper and said, "Take him to the Harlan County Jail". Whereupon, without the evidentiary hearing whatsoever, without benefit of legal advice or legal counsel, without any advice as to his legal rights, without right to confront the witnesses against him and to introduce evidence of his innocence the Petitioner was taken to the Harlan County Jail by said police officer to serve 30 days, as he was so advised, where he presently remains.

(2) All of the above procedures relating to the trial of the said Petitioner are in total disregard of the rights of the Petitioner as an accused in a criminal case, as guaranteed by the Fourteenth Amendment to the Constitution of the United States of America, and deprive the Petitioner of his right to due process of law under the Fourteenth Amendment to the Constitution of the United States of America and renders the conviction of the Petitioner void *for the following reasons*:

(1) KRS 26.010, conferring criminal jurisdiction upon cities of all classes and KRS 26.200 fixing the qualifications of police judges in cities of the 5th and 6th classes, deny Petitioner equal protection of the laws (a right accorded to him under the Fourteenth Amendment to the Constitution of the United States of Amer-

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ica), he being a person accused of crimes against the laws of Kentucky in the police court of the City of Lynch, Kentucky, a city of the 5th class presided over by a Judge, not cognizant of the constitutional, statutory and common-law substantive and procedural rights accorded to him as a citizen of Kentucky and of the United States of America, whereas a person similarly accused in a city of the 1st and 2nd class is, by virtue of the same chapter provided a judge who is so trained in the law and who is cognizant of such rights.

(2) KRS 26.200, fixing the qualifications of the police judges in cities of the 5th class denies to Petitioner due process of law (a rght accorded to him under the Fourteenth Amendment to the Constitution of the United States of America), he being a person accused of crimes against the laws of Kentucky in the police court of the City of Lynch, Kentucky, a city of the 5th class presided over by a Judge, to-wit: C. B. Russell, the said C. B. Russell not being a person cognizant of the constitutional, statutory and common-law substantive and procedural rights accorded to the said Petitioner as a citizen of Kentucky and of the United States of America.

(3) The Respondent, C. B. Russell, is a "lay judge", who has absolutely no formal training in law, and who has not acquired either by formal education, training or experience, a sufficient body of knowledge relating to the constitutional, statutory and common-law substantive and procedural rights accorded to the Petitioner as an accused in a criminal case, for which reason the Re-

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spondent does not have the competency and the capacity to accord to the Petitioner his constitutional, statutory and common-law substantive and procedural rights which are accorded to him as a citizen of Kentucky and as a citizen of the United States of America. As a direct result of such incompetency and such incapacity, the Petitioner now resides in the County Jail in the City of Harlan, Kentucky, under a jail sentence of 30 days incarceration, upon a charge of driving while intoxicated, even though he has not been accorded the following constitutional rights accorded to him under the Fourteenth Amendment to the Constitution of the United States of America:

(1) His right to equal protection of the laws in that he has not been accorded a tribunal presided over by a judge having the competency and the capacity to accord him all of his constitutional, statutory and common-law substantive and procedural rights.

(2) He is incarcerated without benefit of any evidentiary hearing having been held although he entered a plea of "Not guilty".

(3) He is incarcerated without having had the benefit of a Jury trial.

(4) He is incarcerated without having been afforded the right to confront the witnesses against him.

(5) He is incarcerated without the benefit of having been permitted to produce any evidence in his own behalf.

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(6) He is incarcerated without having been advised of his right to counsel, to trial by jury, to confrontation of witnesses against him, and to an evidentiary hearing. The trial of Petitioner in such tribunal by a judge so incapacitated deprives him of his right to due process of law as guaranteed to him by the Fourteenth Amendment to the Constitution of the United States of America.

WHEREFORE, Petitioner demands that a Writ of Habeas Corpus issue, directing the Jailer of Harlan County to present him before the Honorable Edward G. Hill, Judge, Harlan Circuit Court, at a time and place to be fixed by the Court, and directing the appearance of the said C. B. Russell and the appearance of the said Nathaniel "Trap" Helton to show cause, if any, as required by law, why the Petitioner should not be released from said detention and from custody; that, pending the hearing date and pending an evidentiary hearing on the questions presented in this petition, the Petitioner be admitted to bail; that the Respondent, C. B. Russell, be required to deliver his driver's license to him.

This 19th day of July, 1974.

LONNIE NORTH

By EUGENE GOSS

Attorney for Plaintiff
Central Street
Harlan, Kentucky

APPENDIX 3

HARLAN CIRCUIT COURT

CIVIL ACTION No. 2093

LONNIE NORTH .....*Petitioner*

VS: OPINION AND ORDER

C. B. RUSSELL; NATHANIEL "TRAP" HELTON, Jailer of Harlan County .....*Respondent*

The Petition for Writ of Habeas Corpus in this case came on for hearing on July 23, 1974 at the hour of 9:00 A.M. in the Harlan Circuit Court Room, Harlan, Kentucky, Edward G. Hill, presiding, and the Petitioner, Lonnie North, represented by his counsel, Eugene Goss, having appeared and announced ready and the Respondents, C. B. Russell and Nathaniel "Trap" Helton, having appeared and having announced ready, a evidentiary hearing was held by the Court, in which the Petitioner, Lonnie North, presented testimonial evidence from witnesses from which evidence it patently appears that the allegations for the Petition for Writ of Habeas Corpus are substantially true.

It is the sole contention of the Petitioner in his Writ that he is restrained of his liberty without lawful authority, for the reason that he was "tried" by a lay judge who was constitutionally disqualified from presiding in his case for the reason that the "trial judge" does not have the competency and the capacity to accord to the

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Petitioner his constitutional, statutory and common-law substantive and procedural rights which are accorded to him as a citizen of Kentucky and as a citizen of the United States. The Petitioner assigns in his Petition as grounds for his release:

(1) That KRS 26.010 and KRS 26.200, conferring criminal jurisdiction upon cities of all classes and fixing the qualifications of police judges in cities of the 5th and 6th classes, deny to the Petitioner equal protection of the laws for the reason that such statutes permit a citizen in a 5th class city to be tried by a judge ignorant of the law while the same citizen residing in a 1st or 2nd class city is provided with a judge which is minimally qualified as a practicing lawyer:

(2) Also KRS 26.200 fixing the qualifications of police judges in cities of the 5th class deny to the Petitioner his right to due process of law under the Fourteenth Amendment for the reason that Respondent, C. B. Russell, holding office under such statute, is unable by training, knowledge and experience to accord to him his constitutional statutory, and common-law substantive and procedural rights accorded to him as a citizen of Kentucky and of the United States of America, and;

(3) That the trial judge, C. B. Russell, is a "lay judge" who has no training in the law and who has not acquired either by formal education, training or experience sufficient body of knowledge relating to Petitioner's rights as to enable him to accord to Petitioner

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all of his constitutional, statutory and common-law substantive and procedural rights.

It must be said that he Petitioner has grounded his Petition for Writ of Habeas Corpus solely upon the grounds of the judge's disqualifications by reason of the judge's alleged incompetency and incapacity to accord to him a fair trial. The adequacy of the proceedings themselves to accord to the Petitioner his constitutional rights are not raised in the Petition, and the Petitioner grounds his right to release solely upon what he terms to be the constitutional incapacity or constitutional disqualifications of the trial judge for the reason above stated.

The issues presented in this Writ are similar to those issues presented in the case of *Ditty* v. *Hampton,* 490 SW2d 772 (Ky. 2973), wherein the Court of Appeals reversed a holding by this Court that an accused in a criminal case may not be tried by a tribunal presided over by a judge who is incapable by reason of training, experience and knowledge to accord the Petitioner a fair hearing in which he is accorded all of his rights as a citizen of Kentucky and as a citizen of the United States of America. The occurrences in this case again indicate the basic falacies in a judicial system which allows persons of insufficient training, knowledge and experience to preside at criminal trials which, inherently, require a great deal of training, knowledge, and experience, in order that each citizen be accorded the rights guaranteed to him under the law.

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Obviously, the Petitioner has intentionally grounded his request for release upon the limited constitutional grounds hereinabove set forth. This Court does not feel that it should or can go beyond the Petitioner's pleadings and the evidence and accord relief to the Petitioner in a form different from that relief which he is seeking. It would be easy enough in this case for the Court to hold that, under the evidence, the Petitioner has been denied even his most basic consitutional rights, and order him released from custody. However, he might find himself again facing the same tribunal presided over by the same judge, which would be a wholly inadequate relief of a kind completely different from that which he seeks in this proceeding.

The Court, under the rule in the *Ditty* case, *supra,* is constrained to dismiss the Petition for Writ of Habeas Corpus and to deny the relief requested by the Petitioner, but does so upon the narrow ground that the Fourteenth Amendment to the Constitution of the United States of America does not prohibit the trial of the Petitioner by the Respondent, C. B. Russell, as the duly constituted and presiding judge of the City of Lynch, Kentucky, a city of the 5th class, irrespective of the said trial judge's knowledge or lack of knowledge of the Petitioner's rights as a citizen of Kentucky and as a citizen of the United States of America, and irrespective of the ability or inability of the said judge to accord to the Petitioner those rights which he, as a citizen of Kentucky and as a citizen of the United States of America, holds under the laws

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of the Commonwealth of Kentucky and under the Constitution of the United States of America. In the making of such ruling, the Court reluctantly dissolves the Writ of Habeas Corpus heretofore issued, and orders the Petitioner remanded to the custody of the Harlan County Jailer.

Provided, however, should the Petitioner file a Notice of Appeal, within the time allowed by the pertinent rules, indicating his intention to appeal this case to the Court of Appeals of Kentucky, he shall remain free under the bond previously executed by him.

This 23rd day of July, 1974.

/s/ EDWARD C. HILL, JUDGE

EDWARD C. HILL, JUDGE
HARLAN CIRCUIT COURT

APPENDIX 4

COURT OF APPEALS OF KENTUCKY

FILE No. 74-723

LONNIE NORTH .....*Appellant*

VS: NOTICE OF APPEAL

C. B. PUSSELL; NATHANIEL "TRAP" HELTON, Harlan County Jailer .....*Appellees*

Notice is given to all parties listed above that Lonnie North, the appellant, appeals to the Supreme Court of the United States from the decision of the Court of Appeals of Kentucky in the above-styled case, rendered March 21, 1975.

This appeal is filed as a matter of right pursuant to 28 U.S.C. Section 1257 (2) (1970).

ATTORNEYS FOR APPELLANT, LONNIE NORTH

/s/CHARLES E. GOSS

EUGENE GOSS
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Harlan, Kentucky

DEAN RIVKIN
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CERTIFICATE

I hereby certify that I have this day mailed a true and correct copy of the foregoing Notice of Appeal to Honorable Wix Unthank, Commonwealth Attorney, Harlan, Kentucky 40831 and Honorable Ed W. Hancock, Attorney General, Capitol Building, Frankfort, Kentucky 40601, Attorneys for Appellees.

This 26th day of March, 1975.

/s/ Charles E. Goss

APPENDIX 5

THE PETITIONER CALLED AS A WITNESS,

C. B. RUSSELL,

WHO, HAVING BEEN DULY SWORN,
TESTIFIED AS FOLLOWS:

Direct Examination by Mr. Eugene Goss:

1 State your name.
A C. B. Russell, Jr.

2 Were you on the 18th day of July, 1974, the appointed City Judge for the City of Lynch, Kentucky?
A I was.

3 Is that a city of fifth class located at Lynch, Harlan County, Kentucky?
A Yes, sir.

4 When were you appointed as City Judge?
A January 7th.

5 1974?
A. Yes, sir. That's when I took office.

6 How much formal education do you have?
A I have a high school.

7 What kind of work have you done during your life time?
A The last twenty-three years I've been an assistant mine foreman with U.S. Steel.

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8 You worked as an underground coal miner?

A Yes, sir.

9 Have you ever attended any college or university?

A No, sir.

10 Do you hold any degree from any college or university?

A No, sir.

11 Have you ever attended any law school?

A No, sir.

12 Do you hold any degree from any law school?

A No, sir.

13 Prior to your appointment as City Judge of the City of Lynch, Kentucky, had you had any legal training whatsoever in the field of law?

A No, sir.

14 Prior to your appointment as City Judge of the City of Lynch, Kentucky, had you any previous judicial experience?

A No, sir.

15 Prior to your appointment as City Judge of the City of Lynch, Kentucky, had you had any previous legal experience of any kind?

A No, sir.

16 Have you had any legal training of any kind since your appointment?

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A Well, the only thing I can say, if I have any doubt, I just consult with the city lawyer, Mr. Bill Forester.

17 And when you consult with the city lawyer for advice, you mean you consult the city lawyer for advice in criminal cases, such as this case?

A Yes, sir.

18 And when you receive advice from the city attorney, do you follow that advice?

A Yes, sir.

19 Are you—would you say, you very much depended upon the city attorney for giving you guidance and final advice as to what procedures you should follow and as to what actions you should take in a criminal case?

A Would you mind re-stating that?

20 Read it back.

Reporter reads back question. "Would you say, you very much depend upon the city attorney for giving you guidance and final advice on what procedures you should follow and as to what actions you should take in a criminal case?"

A If I have any doubt in any case, I contact the lawyer.

21 You contact the city prosecutor?

A Yes, sir, for legal advice.

22 You depend on his decisions and the advice he

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gives you as to what actions you should take both from the procedural standpoint and as to what disposition you should make of a particular question? Is that correct?

A Yes, sir.

23 Since your appointment as City Judge, have you had any legal training whatsoever?

A No, sir. As far as schooling, no.

24 Have you ever taken any course at all in legal jurisdiction?

A No, sir.

25 Have you ever taken a course of any kind or had any legal training of any nature, relating to law?

A No, sir.

26 Have you ever had any course or any training whatsoever relating to the judiciary?

A No, sir.

27 Have you ever had any course or had any training with respect to the rules of evidence in a criminal or civil case?

A No, sir.

28 Have you ever had any course or any training whatsoever relating to the provisions of the Constitution of the United States of America?

A No, sir.

29 Are you familiar with the 14th Amendment to

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the Constitution of the United States and as to what it provides?

A Yes, sir.

30 What does that provide?

A Right off hand, I don't—something about judicial. I think one of them is judicial procedure or something another. I'm not for sure.

31 Do you think the 14th Amendment to the Constitution of the United States deals with judicial procedure?

A Right off hand, Mr. Goss, I couldn't tell you.

32 Are you familiar with the term "due process of law" or "equal protection of the law"?

A Yes, sir.

33 In legal meaning?

A No, that's beyond me.

34 Are you familiar with the rights according to a defendant as accused in a criminal case under the 14th Amendment of the Constitution of the United States of America?

A Would you re-state that question?

35 Are you familiar with the rights according to a defendant as accused in a criminal case under the 14th Amendment to the Constitution of the United States of America?

MR. WIX UNTHANK: May it please the Court. At this time, we'd like to object. The witness has

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stated he has not had any legal training, and I think these questions here are just repetitious, bearing upon the question of legal training.

THE COURT: I think the fact has been established that he's not a lawyer, he doesn't know any law, he hasn't studied any law.

MR. EUGENE GOSS: Judge, I think we're entitled to prove the depth of the knowledge — of his knowledge with respect to specific knowledge of various legal formulas, legal procedures, such as law. He may have some inherent knowledge that we know nothing about. I'm not going to unduly labor this thing, but I think it's important to our case that we probe with in some detail, the man's knowledge of substance and procedure of law, and I would beg the Court's indulgence that it won't take a great deal of time, but it's extremely important in our case.

THE COURT: Well, go ahead.

36 Are you familiar with the rights according to a defendant as accused in a criminal case under the 14th Amendment of the Constitution of the United States of America?

A Mr. Goss, as I previous said, I don't know, exactly understand this 14th Amendment. I know part of it.

37 Are you familiar with the statutes of the Commonwealth of Kentucky relating to the empaneling of

APPENDIX 5

a petit jury, the qualifications of a petit jury and the selection of a petit jury in a particular criminal case?

A Well, I think I know some of the qualifications but as far as all of them, I don't.

38 Are you familiar with the order of trial in a criminal case?

A No, sir.

39 Are you familiar with the requirements of law of the Commonwealth of Kentucky with respect to the arraignment of a defendent accused of a crime?

A Yes, sir.

40 What are those procedures?

A You mean, are you talking about when someone is arrested?

41 Yes, and arraigned?

A Placed under bond and then have a hearing. Is that what you're referring to?

42 Yes. What are the procedures for arraignment of a defendant?

A Well, to me, that's the procedure.

43 That's all the procedure that you're familiar with?

A Well, after you give them a hearing, trial by jury, if he pleads guilty. I mean not guilty.

44 Are you familiar in a general way with the rules of criminal procedure of the Commonwealth of Kentucky?

A No, sir.

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45 Are you familiar in a general way with the provisions of Kentucky Revised Statutes as they relate to criminal prosecution?

A Would you re-phrase that statement?

46 Are you familiar in a general way with the provisions of the Kentucky Revised Statutes as they relate to criminal prosecution?

A Well, the only procedure I know, I can follow through the books we have up there now. Whether that answers you question or not, I don't know.

47 Do you have a copy of the Kentucky Revised Statutes in your office?

A Yes, sir.

48 Are you familiar with the Court system of the Commonwealth of Kentucky as established by the Constitution of Kentucky?

A Not altogether.

49 Are you familiar with a set of books known as the Kentucky Digest published by the West Publishing Company?

A The Kentucky Digest?

50 Do you know what that set of books is and what it's for?

A No, not off hand, I couldn't.

51 Are you familiar with a set of books known as the Kentucky Decisions published by the West Publishing Company?

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A I couldn't tell you, Mr. Goss, who published them or anything else. All I know is how to go through the index and look up what I want.

52 What is your understanding with respect to the usefulness of the case decisions published by the Court of Appeals of Kentucky?

MR. WIX UNTHANK: Your Honor, I'd like to object and renew my objection.

MR. EUGENE GOSS: Judge, I've got about four or five more questions left.

THE COURT: Can't you stipulate all this?

MR. WIX UNTHANK: Yes, sir.

THE COURT: All right, fix you up a stipulation.

MR. EUGENE GOSS: Your Honor, I think I could finish my questions faster than we could stipulate it.

MR. WIX UNTHANK: Well, I'd like to renew my objection.

53 Do you know the usefulness of those, the decisions of the Court of Appeals of Kentucky?

A Do I what?

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54 Do you know why the decisions of the Court of Appeals are useful in the administration of law?

A I can say misrepresentation of justice.

55 Are you familiar with the Supreme Court reports of the United States Supreme Court?

A I'm familiar with some of them, but I don't agree with all of them.

56 What is your understanding with respect to the effect that a Judge should give between conflicting rulings made by the Court of Appeals of Kentucky and the Supreme Court of the United States?

A I didn't hear that, Mr. Goss.

57 What is your understanding with respect to the effect that a Judge should give between conflicting rulings made by the Kentucky Court of Appeals and the Supreme Court of the Uinted States of America? Do you understand the question?

A No, I really don't. I don't think I know, if it would go to the Supreme Court from the Kentucky Court of Appeals. Is that what you're referring to?

58 Yes.

A Well, I just don't—as I say, there's a lot of cases the Supreme Court rules on I don't agree.

59 Are you a licensed lawyer?

A No, sir.

60 Judge, is it fair to say that you have only a very

APPENDIX 5

vague knowledge of the criminal law of the Commonwealth of Kentucky and United States of America with respect to the Constitutional and statutory rights that a defendent has and with respect to the enforcement of those rights; and with respect to criminal procedures of criminal law as it relates to criminal trials. Is that a fair statement?

A I'd say—no. I'd say I've got very little as far as back ground, but I've got a whole lot of common sense, Mr. Goss.

61 Now, did you bring with you the order book?

A Yes, sir.

62 From the city of Lynch relating to a trial of the defendant—the petitioner, Lonnie North?

A I brought the criminal docket with me which I docketed it in the book and I also have the warrant and the breathelizer test.

63 Do you have here with you a copy of the warrant which you served on this man?

A Yes, sir.

64 And this warrant was signed by you on the 12th day of July, 1974?

A Yes, sir.

65 And in that warrant you accused him of "driving while intoxicated." Is that correct?

A Yes.

APPENDIX 5

66 And you admitted the petitioner to bail in the sum of $175.00?

A Yes, sir.

67 Was that a cash bond?

A No, sir. Mr. North there, his name is on that. It's Eli North.

MR. EUGENE GOSS: Judge, we'd like to have a copy of this complaint filed with the stenographer and mark it "Judge Russell, Exhibit 1."

THE COURT: All right, have a copy made.

68 Now, you set trial on this man's case on what day?

A 18th.

69 18th of July?

A Yes, sir.

70 And on the 18th of July, did he appear in your Court?

A Yes, sir.

71 At what time?

A He was about forty minutes late, thirty five or forty minutes late.

72 What time did your Court take up?

A 7:00.

73 You mean they were late getting there?

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A Mr. North here, Lonnie North was late getting there, Mr. Goss.

74 Did you, in connection with the trial of his case, give him a jury trial?

A No, sir.

75 I believe his plea was not guilty, wasn't it?

A Yes, sir.

76 And he voiced that plea in your presence and in open Court?

A Yes, sir.

77 And you proceeded then to try him yourself?

A Yes, sir.

78 Was there an evidential hearing of any kind?

A You want me to proceed to tell you how it was I started with?

79 No, I just want to know if you held, before passing judgment on him, did you hold any kind of evidential hearing?

A Yes, sir.

80 What kind of an evidential hearing did you hold?

A Well, I sworn the arresting officer in and let him tell his story without any questions from me, let him tell his part, you know, his part in it, in the arrest. When I got through, I asked Mr. North if he had anyting and he said, "Yes." I asked him if he wanted—any questions he wanted to ask Mr. Potter and he said, "Yes." So he

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proceeded to ask him questions and when he got through, I asked him if he was through, and he said, "Yes."

81 And that's when you proceeded to find him guilty?

A Yes, sir.

82 Did you—what judgment did you make in the case?

A What sentence did I put on him?

83 Right.

A $150.00 and thirty days in jail and revoked his driver's licenses.

84 Now, do you have a judgment you prepared and entered into your order book, any kind of a judgment in which he is—in which that becomes the judgment of your Court?

A Yes, sir, in this docket book.

85 All right, would you find that in the docket there for me.

A Page 139, Item 411, I mean 410.

86 Would you read that, every word of that judgment to the Court?

A "On a DWI, license revoked, sentence to thirty days in jail, fine $139.50, costs $10.50, total of $150.00. 18th day of July, 1974."

87 And that's all you've got?

A And this is my signature.

APPENDIX 5

88 That's all you have on your book?

A Yes, sir.

MR. EUGENE GOSS: Judge, we'd like to enter a copy of that in to the record.

THE COURT: I don't know how you're going to make it. I think she's got the substance of it.

MR. EUGENE GOSS: All right. If the judgment as entered into the record is sufficient, do you have any objection to that, Mr. Unthank?

MR. WIX UNTHANK. No objection.

CROSS EXAMINATION BY MR. WIX UNTHANK:

1 Mr. Russell, how long have you lived at Lynch?

A Well, I was born in Lynch and I moved in 1947, 46 years old in 1947, and I moved and came back to Lynch, three years prior—

2 Well, is it a fair statement to say you've been there approximately forty years or something like that?

A Forty three years.

3 Now, what class city is Lynch?

A Fifth class.

MR. WIX UNTHANK: Mr. Goss, may it be stipulated in the record that Lynch is a fifth class municipal corporation under the laws of the State of Kentucky?

MR. EUGENE GOSS: Yes, sir.

MR. WIX UNTHANK: And that as such the statutes provide for the office of police judge for the city of Lynch?

MR. EUGENE GOSS: That's in my pleading

MR. WIX UNTHANK: Now, is it also agreed and stipulated that driving under the influence of intoxicating beverages is a statuatory crime in the State of Kentucky?

MR. EUGENE GOSS: Right.

MR. WIX UNTHANK: And as such, the police court of the fifth class city would have jurisdiction of this charge?

MR. EUGENE GOSS: Jurisdiction is conferred upon the police court, by the statutes.

MR. WIX UNTHANK: Now, is there any question concerning the legality of his arrest upon this charge by the officer?

MR. EUGENE GOSS: No.

MR. WIX UNTHANK: Then it is stipulated that he was legally arrested and charged with this offense?

MR. EUGENE GOSS: That isn't brought into issue in our petition.

MR. WIX UNTHANK: No, but can it be stipulated?

MR. EUGENE GOSS: Yes.

4 Now, Mr. Russell, going back to the time that

the officer came up there with the defendant, did the defendant demand a jury trial?

A The night of the hearing, is that what you're talking about?

5 Yes, sir. The night that you tried the case, did he demand a jury trial?

A He said, "not guilty." Yes, he wanted a trial by jury.

6 He said he was not guilty?

A Yes.

7 And he asked for a trial by jury?

A By the jury, yes.

8 Now, I believe you stated that you depended on the county attorney to tell you what the law was—I mean your city attorney to tell you what the law was?

A Yes, sir.

9 The city attorney of Lynch is William R. Forester?

A Yes, sir.

10 He is a member of the Harlan County Bar Association, is he not?

A Yes, sir.

11 And he's been practicing law in Harlan County quite a bit?

THE COURT: Can you stipulate that Mr. Forester is competent?

APPENDIX 5

MR. EUGENE GOSS: Yes, sir.

12 Now, Mr. Forester tells you what the law is but he does not tell you how to interpret it, does he?

A No, sir. He tells me, like you said, what the law is, you know. In other words, where I've got jurisdiction and like I stated awhile ago, if I have any doubt, I call our attorney. I want to be right.

13 As to how you're going to do something, you determine that yourself after he tells you what it is?

A Yes, sir.

REDIRECT EXAMINATION BY MR. EUGENE GOSS:

1 Did you empanel a jury there when he was tried?

A No, sir. We had no jury trial.

2 Prior to the commencement of the hearing which you said that you had there, did you advise the petitioner that he had a right to trial by jury, and that he had the right to introduce evidence in his own behalf and to confront the witnesses against him?

A I think so. That's usually the procedure.

3 Did you advise him that he had a right to have an attorney present to represent him in this matter?

A Yes.

4 You advised him that he had that right?

APPENDIX 5

A I'm pretty sure, Mr. Goss, I'm not going to say. That's usually the standard procedure.

5 Did you advise him that he had a right, in so many words or these direct words, did you advise him in words or substance that he had the right to introduce witnesses in his own behalf?

A He had no witnesses.

RECROSS EAMINATION BY MR. WIX UNTHANK:

1 Mr. Russell, if I may, prior to after taking his plea, did you make a telephone call to the city attorney?

A Yes, sir.

2 And I believe after you made the telephone call, you were under the impression or believed which you received the advice, that he did not have to have a jury trial. Is that correct?

A That's right.

REDIRECT EXAMINATION BY MR. EUGENE GOSS:

1 And you followed that advice?

A Yes, sir.

2 Did Mr. North have an attorney present there to represent him when you tried this case?

A No.

APPENDIX 6

(1) JUSTICES OF PEACE

4 Attorneys	)	99.4%
601 Non-attorneys	)	Non-attorneys

(2) POLICE COURT JUDGES

41 Attorneys	)	78.1%
146 Non-attorneys	)	Non-attorneys

(3) COUNTY JUDGES

14 Attorneys	)	88.4%
106 Non-attorneys	)	Non-attorneys

APPENDIX 7

KRS 189.520 (2) provides as follows:

"No person shall operate a motor vehicle anywhere in this state while under the influence of intoxicating beverages or any drug which may impair one's driving ability".

KRS 189.793 (10) (a) provides as follows:

"Any person who violates subsection (2) of KRS 189.520 shall be fined, for the first offense, not less than one hundred nor more than five hundred dollars, and for each subsequent offense he shall be fined not less than one hundred nor more than five hundred dollars and imprisoned for not more than six months".

APPENDIX 8

Kentucky Constitution § 156:

"Six classes; population determines classification; organization and assignment. — The cities and towns of this Commonwealth, for the purposes of their organization and government, shall be divided into six classes. The organization and powers of each class shall be defined and provided for by general laws, so that all municipal corporations of the same class shall possess the same powers and be subject to the same restrictions. To the first class shall belong cities with a population of one hundred thousand or more; to the second class, cities with a population of twenty thousand or more, and less than one hundred thousand; to the third class, cities with a population of eight thousand or more, and less than twenty thousand; to the fourth class, cities and towns with a population of three thousand or more, and less than eight thousand; to the fifth class, cities and towns with a population of one thousand or more, and less than three thousand; to the sixth class, towns with a population of less than one thousand. The general assembly shall assign the cities and towns of the Commonwealth to the classes to which they respectively belong, and change assignments made as the population of said cities and towns may increase or decrease, and in the absence of other satisfactory information as to their population, shall be governed by the last preceding federal census in so doing; but no city or town

APPENDIX 8

shall be transferred from one class to another, except in pursuance of a law previously enacted and providing therefore. The genera! assembly, by a general law, shall provide how towns may be organized, and enact laws for the government of such towns until the same are assigned to one or the other of the classes above named; but such assignment shall be made at the first session of the general assembly after he organization of said town or city."

APPENDIX

Supreme Court, U. S.
FILED
JUL 30 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1409

LONNIE NORTH, *Appellant*

v.

C. B. RUSSELL; NATHANIEL "TRAP" HELTON,
JAILER OF HARLAN COUNTY, *Appellees*

ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

FILED MAY 9, 1975

PROBABLE JURISDICTION NOTED JUNE 23, 1975

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1. RELEVANT DOCKET ENTRIES

Court of Appeals of Kentucky

NO.		Date Filed
1.	Appeal Filed	8 - 5-75
2.	Appellant Filed Record, Notice of Appeal and Motion for Appeal	8 - 5-75
3.	Appellant Filed Briefs	8 - 5-75
4.	Appellees filed notice and motion to rescind bail	8 - 6-74
5.	Appellees filed notice and motion to dismiss appeal	8 - 6-74
6.	Appellant filed Response to Motion to Rescind Bail, Motion for Stay, and Motion to Advance Appeal	8 - 8-74
7.	Per Curiam Opinion Delivered Affirming	8 -12-74
8.	Appellant Filed Notice of Appeal to U.S. Supreme Court	8 -28-74
9.	Appellant Filed Motion to Stay Mandate	8 -28-74
10.	Appellee Filed Response to motion for stay of mandate	8 -29-74
11.	Court Delivered Order Overruling Motion for Stay	9 - 4-74

RELEVANT DOCKET ENTRIES

NO.		Date Filed
12.	Received Order of U.S. Supreme Court Staying Enforcement and Execution of Mandate	9 -12-74
13.	Order Delivered to Court of Appeals staying enforcement and execution of mandate (per U.S. Supreme Court Order)	9 -12-74
14.	Mandate Issued	9 -12-74
15.	Received Order of U.S. Supreme Court Docketing Appeal	10-22-74
16.	Appellee Filed Motion to File Order of U.S. Supreme Court and Copy of Motion to Dismiss or Affirm of Record in U.S. Supreme Court	12-30-74
17.	Motion to File Supreme Court Order and Motion to Dismiss or Affirmed sustained by Order Delivered	1 -14-75
18.	Appellee's Motion to Dismiss or Affirm as filed in the U.S. Supreme Court filed in this appeal	1 -14-75
19.	Appellee Filed Motion for leave to File Brief on Remand	1 -23-75

RELEVANT DOCKET ENTRIES

NO.		Date Filed
20.	Mandate of U.S. Supreme Court Received (Issued 1-22-75)	1 -24-75
21.	Appellee Filed Response to Appellant's Motion for leave to File Brief on Remand and moved for leave to File Brief on Remand	2 - 3-75
22.	Appellant Filed Motion for leave to File Copies of Appellants' Jurisdictional Statement and Response to Appellees' Motion to Dismiss or Affirm in the U.S. Supreme Court	2 - 4-75
23.	Affirmed (Justice Palmore)	3 -21-75
24.	Appellant Filed Notice and Motion to Stay Execution and Enforcement of Mandate	3 -31-75
25.	Appellant Filed Notice of Appeal to U.S. Supreme Court with Designation of Record	3 -28-75
26.	Court Order Delivered Granting Stay of Execution and Enforcement of the Mandate	4 -15-75

II. Petition of Writ of Habeas Corpus

HARLAN CIRCUIT COURT

2083

LONNIE NORTH ..... PETITIONER

VS: PETITION FOR WRIT OF HABEAS CORPUS

C. B. RUSSELL; NATHANIEL "TRAP" HELTON, Jailer of Harlan County ..... RESPONDENTS

(1) The Petitioner, Lonnie North, being first duly sworn, represents to the Court that he has been and is being detained by the Jailer of Harlan County, Kentucky, Nathaniel "Trap" Helton, in the Harlan County Jail under the order and judgment of the Respondent, C. B. Russell, Lynch City Court Judge, without lawful authority, the pretended cause of such imprisonment being as follows:

> "On or about Wednesday, July 10, 1974, the Petitioner was detained by the Chief of Police at Lynch, Kentucky, whose name is unknown to the Petitioner and held in the City of Lynch, Kentucky for the arrival of the Cumberland City Police; whereupon the Petitioner was taken from the City of Lynch by Chuck Hollitt to the City of Cumberland, Kentucky, a separate municipal entity, and cited by the said Cumberland City Police upon a charge of reckless driving; where-

upon the Petitioner returned to his home at Lynch, Kentucky. Shortly thereafter, the Petitioner received a telephone call from the Lynch City Police directing him to come to the Lynch City Hall to remove the motorcycle upon which the Petitioner was riding at the time that he was detained by Lynch City Police; whereupon the Petitioner traveled to the Lynch City Hall in company with his brother, Ronald North, and his Father, Eli North, for the purpose of assuming possession of the motorcycle; whereupon, a Lynch City Policeman known only as "Potter", whose full and true name is unknown to the Petitioner, directed the Petitioner to Lynch City Hall and cited the Petitioner accusing him of the crime of driving while intoxicated; whereupon, the Petitioner was immediately admitted to bail and returned to his home at Lynch, Kentucky under directions from the said "Potter" to return to City Hall on Thursday, July 18, 1974, at the hour of 8:00 P.M.; whereupon, the Petitioner appeared at the City Hall at the appointed time and place before the Respondent, C. B. Russell who, in the presence of Eli North, Terry Creech, and Hal Woods, called for the Petitioner's plea to the charge of driving while intoxicated, with the Petitioner responding, "Not guilty". Whereupon, in the presence of the aforesaid witnesses, the Respondent, C. B. Russell, stated, "I will give you a jury trial if it takes all damn night". Then he left the room and was gone about ten minutes. He came back and said, "I

have talked to a lawyer and we don't need no jury, I am going to try you myself. I fine you $150.00, suspend your operator's license and give you 30 days in County Jail". Whereupon he said, "Where are the Police". Upon arrival of the police, the said Respondent, C. B. Russell, handed the said city police a slip of paper and said, "Take him to the Harlan County Jail". Whereupon, without any evidentiary hearing whatsoever, without benefit of legal advice or legal counsel, without any advice as to his legal rights, without right to confront the witnesses against him and to introduce evidence of his innocence the Petitioner was taken to the Harlan County Jail by said police officer to serve 30 days, as he was so advised, where he presently remains.

(2) All of the above procedures relating to the trial of the said Petitioner are in total disregard of the rights of the Petitioner as an accused in a criminal case, as guaranteed by the Fourteenth Amendment to the Constitution of the United States of America, and deprive the Petitioner of his right to due process of law under the Fourteenth Amendment and to equal protection of laws under the Fourteenth Amendment to the Constitution of the United States of America and renders the conviction of the Petitioner void *for the following reasons*:

(1) KRS 26.010, conferring criminal jurisdiction upon cities of all classes and KRS 26.200 fixing the qualifications of police judges in cities of the 5th and

6th classes, deny Petitioner equal protection of the laws (a right accorded to him under the Fourteenth Amendment to the Constitution of the United States of America), he being a person accused of crimes against the laws of Kentucky in the police court of the City of Lynch, Kentucky, a city of the 5th class presided over by a Judge, not cognizant of the constitutional, statutory and common-law substantive and procedural rights accorded to him as a citizen of Kentucky and of the United States of America, whereas a person similarly accused in a city of the 1st and 2nd class is, by virtue of the same chapter provided a judge who is so trained in the law and who is cognizant of such rights.

(2) KRS 26.200, fixing the qualifications of the police judges in cities of the 5th class denies to Petitioner due process of law (a right accorded to him under the Fourteenth Amendment to the Constitution of the United States of America), he being a person accused of crimes against the laws of Kentucky in the police court of the City of Lynch, Kentucky, a city of the 5th class presided over by a Judge, to-wit: C. B. Russell, the said C. B. Russell not being a person cognizant of the constitutional, statutory and common-law substantive and procedural rights accorded to the said Petitioner as a citizen of Kentucky and of the United States of America.

(3) The Respondent, C. B. Russell, is a "lay judge", who has absolutely no formal training in law,

and who has not acquired either by formal education, training or experience, a sufficient body of knowledge relating to the constitutional, statutory and common-law substantive and procedural rights accorded to the Petitioner as an accused in a criminal case, for which reason the Respondent does not have the competency and the capacity to accord to the Petitioner his constitutional, statutory and common-law substantive and procedural rights which are accorded to him as a citizen of Kentucky and as a citizen of the United States of America. As a direct result of such incompetency and such incapacity, the Petitioner now resides in the County Jail in the City of Harlan, Kentucky, under a jail sentence of 30 days incarceration, upon a charge of driving while intoxicated, even though he has not been accorded the following constitutional rights accorded to him under the Fourteenth Amendment to the Constitution of the United States of America:

(1) His right to equal protection of the laws in that he has not been accorded a tribunal presided over by a judge having the competency and the capacity to accord him all of his constitutional, statutory and common-law substantive and procedural rights.

(2) He is incarcerated without benefit of any evidentiary hearing having been held although he entered a plea of "Not guilty".

(3) He is incarcerated without having had the benefit of a Jury trial.

(4) He is incarcerated without having been afforded the right to confront the witnesses against him.

(5) He is incarcerated without the benefit of having been permitted to produce any evidence in his own behalf.

(6) He is incarcerated without having been advised of his right to counsel, to trial by jury, to confrontation of witnesses against him, and to an evidentiary hearing. The trial of Petitioner in such tribunal by a judge so incapacitated deprives him of his right to due process of law as guaranteed to him by the Fourteenth Amendment to the Constitution of the United States of America.

WHEREFORE, Petitioner demands that a Writ of Habeas Corpus issue, directing the Jailer of Harlan County to present him before the Honorable Edward G. Hill, Judge, Harlan Circuit Court, at a time and place to be fixed by the Court, and directing the appearance of the said C. B. Russell and the appearance of the said Nathaniel "Trap" Helton to show cause, if any, as required by law, why the Petitioner should not be released from said detention and from custody; that, pending the hearing date and pending an evidentiary hearing on the questions presented in this petition, the Petitioner be admitted to bail; that the Respondent,

C. B. Russell, be required to deliver his driver's license to him.

This 19th day of July, 1974.

LONNIE NORTH

/s/ Eugene Goss
By _____
Attorney for Plaintiff
EUGENE GOSS
Attorney at Law
Central Street
Harlan, Kentucky

I, LONNIE NORTH, certify that I have read the foregoing Petition for Writ of Habeas Corpus and that the statements contained therein are true.

/s/ Lonnie North
LONNIE NORTH

STATE OF KENTUCKY)
) Sct.
COUNTY OF HARLAN)

Subscribed and sworn to before me by LONNIE NORTH on this 19th day of July, 1974.

/s/ Brenda L. Cassim
NOTARY PUBLIC

My Commission Expires: 8-22-75

III. Transcript of Evidence before the Trial Court

HARLAN CIRCUIT COURT
CIVIL ACTION FILE NO. 2003

LONNIE NORTH .... **PETITIONER**

VS: OFFICIAL REPORTER'S TRANSCRIPT OF EVIDENCE

C. B. RUSSELL; NATHANIEL "TRAP" HELTON, Jailer of Harlan County ..... **RESPONDENTS**

ORIGINAL TRANSCRIPT

Received from Molly Sue Baker, this 1st day of August, 1974. Mary Lou Coldiron, Clerk, Harlan Circuit Court by S. B. Jones, D.C.

Filed Aug. 5, 1974, Frances Jones Mills, Clerk, Court of Appeals.

HARLAN CIRCUIT COURT
CIVIL ACTION FILE NO. 2093

LONNIE NORTH ..... PETITIONER

VS: OFFICIAL REPORTER'S TRANSCRIPT OF EVIDENCE

C. B. RUSSELL; NATHANIEL "TRAP" HELTON, Jailer of Harlan County ..... RESPONDENTS

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HARLAN CIRCUIT COURT
CIVIL ACTION FILE NO. 2093

LONNIE NORTH ..... PETITIONER

VS: OFFICIAL REPORTER'S TRANSCRIPT OF EVIDENCE

C. B. RUSSELL; NATHANIEL "TRAP" HELTON, Jailer of Harlan County ..... RESPONDENTS

This cause came on for hearing before Honorable Edward G. Hill, Judge of the Harlan Circuit Court, on today, July 23, 1974.

On motion of the petitioner, the Official Court Reporter, Molly Sue Baker, was directed to take short-hand notes of all evidence introduced and heard, or offered to be introduced and rejected, all objections of counsel thereto, all motions, avowals and all other proceedings had on the trial of this case.

ATTORNEY FOR THE PETITIONER, LONNIE NORTH:
HONORABLE EUGENE GOSS
ATTORNEY AT LAW
HARLAN, KENTUCKY

ATTORNEY FOR THE RESPONDENT, C. B. RUSSELL:
HONORABLE WIX UNTHANK
ATTORNEY AT LAW
HARLAN, KENTUCKY

THE COURT: What says the petitioner?
MR. EUGENE GOSS: The petitioner, is ready, Your Honor.

THE COURT: Is the respondent ready?

MR. WIX UNTHANK: Yes, Your Honor.

THE COURT: All right, call your witness.

THE PETITIONER CALLED AS A WITNESS,
C. B. RUSSELL,

WHO, HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION BY MR. EUGENE GOSS:

1 State your name.

A C. B. Russell, Jr.

2 Were you on the 18th day of July, 1974, the appointed City Judge for the City of Lynch, Kentucky?

A I was.

3 Is that a city of fifth class located at Lynch, Harlan County, Kentucky?

A Yes, sir.

4 When were you appointed as City Judge?

A January 7th.

5 1974?

A Yes, sir. That's when I took office.

6 How much formal education do you have?

A I have a high school.

7 What kind of work have you done during your life time?

A The last twenty three years I've been an assistant mine foreman with U. S. Steel.

8 You worked as an underground coal miner?

A Yes, sir.

9 Have you ever attended any college or university?

A No, sir.

10 Do you hold any degree from any college or university?

A No, sir.

11 Have you ever attended any law school?

A No, sir.

12 Do you hold any degree from any law school?

A No, sir.

13 Prior to your appointment as City Judge of the City of Lynch, Kentucky, had you had any legal training whatsoever in the field of law?

A No, sir.

14 Prior to your appointment as City Judge of the City of Lynch, Kentucky, had you any previous judicial experience?

A No, sir.

15 Prior to your appointment as City Judge of the City of Lynch, Kentucky, had you had any previous legal experience of any kind?

A No, sir.

16 Have you had any legal training of any kind since your appointment?

A Well, the only thing I can say, if I have any doubt, I just consult with the city lawyer, Mr. Bill Forester.

17 And when you consult with the city lawyer for advice, you mean you consult the city lawyer for advice in criminal cases, such as this case?

A Yes, sir.

18 And when you receive advice from the city attorney, do you follow that advice?

A Yes, sir.

19 Are you — would you say, you very much depended upon the city attorney for giving you guidance and final advice as to what procedures you should follow and as to what actions you should take in a criminal case?

A Would you mind re-stating that?

20 Read it back.

Reporter reads back question. "Would you say, you very much depended upon the city attorney for giving you guidance and final advice as to what proce-

dures you should follow and as to what actions you should take in a criminal case?"

A If I have any doubt in any case, I contact the lawyer.

21 You contact the city prosecutor?

A Yes, sir, for legal advice.

22 You depend on his decisions and the advice he gives you as to what actions you should take both from the procedural standpoint and as to what disposition you should make of a particular question? Is that correct?

A Yes, sir.

23 Since your appointment as City Judge, have you had any legal training whatsoever?

A No, sir. As far as schooling, no.

24 Have you ever taken any course at all in legal jurisdiction?

A No, sir.

25 Have you ever taken a course of any kind or had any legal training of any nature, relating to law?

A No, sir.

26 Have you ever had any course or any training whatsoever relating to the judiciary?

A No, sir.

27 Have you ever had any course or had any training

with respect to the rules of evidence in a criminal or civil case?

A No, sir.

28 Have you ever had any course or any training whatsoever relating to the provisions of the Constitution of the United States of America?

A No, sir.

29 Are you familiar with the 14th Amendment to the Constitution of the United States and as to what it provides?

A Yes, sir.

30 What does that provide?

A Right off hand, I don't — something about judicial. I think one of them is judicial procedure or something another. I'm not for sure.

31 Do you think the 14th Amendment to the Constitution of the United States deals with judicial procedure?

A Right off hand, Mr. Goss, I couldn't tell you.

32 Are you familiar with the term "due process of law" or "equal protection of the law"?

A Yes, sir.

33 In legal meaning?

A No, that's beyond me.

34 Are you familiar with the rights according to a

defendant as accused in a criminal case under the 14th Amendment of the Constitution of the United States of America?

A Would you re-state that question?

35 Are you familiar with the rights according to a defendant as accused in a criminal case under the 14th Amendment to the Constitution of the United States of America?

MR. WIX UNTHANK: May it please the Court. At this time, we'd like to object. The witness has stated he has not had any legal training, and I think these questions here are just repetitious, bearing upon the questions of legal training.

THE COURT: I think the fact has been established that he's not a lawyer, he doesn't know any law, he hasn't studied any law.

MR. EUGENE GOSS: Judge, I think we're entitled to probe the depth of the knowledge — of his knowledge with respect to specific knowledge of various legal formulas, legal procedures, such as law. He may have some inherent knowledge that we know nothing about. I'm not going to unduly labor this thing, but I think it's important to our case that we probe with in some detail, the man's knowledge of substance and procedure of law, and I would beg the Court's indulgence that it won't take a great deal of time, but it's extremely important in our case.

THE COURT: Well, go ahead.

36 Are you familiar with the rights according to a defendant as accused in a criminal case under the 14th Amendment of the Constitution of the United States of America?

A Mr. Goss, as I previous said, I don't know, exactly understand this 14th Amendment. I know part of it.

37 Are you familiar with the statutes of the Commonwealth of Kentucky relating to the empaneling of a petit jury, the qualifications of a petit jury and the selection of a petit jury in a particular criminal case?

A Well, I think I know some of the qualifications but as far as all of them, I don't.

38 Are you familiar with the order of trial in a criminal case?

A No, sir.

39 Are you familiar with the requirements of law of the Commonwealth of Kentucky with respect to the arraignment of a defendant accused of a crime?

A Yes, sir.

40 What are those procedures?

A You mean, are you talking about when someone is arrested?

41 Yes, and arraigned?

A Placed under bond and then have a hearing. Is that what you're referring to?

42 Yes. What are the procedures for arraignment of a defendant?

A Well, to me, that's the procedure.

43 That's all the procedure that you're familiar with?

A Well, after you give them a hearing, trial by jury, if he pleads guilty. I mean not guilty.

44 Are you familiar in a general way with the rules of criminal procedure of the Commonwealth of Kentucky?

A No, sir.

45 Are you familiar in a general way with the provisions of Kentucky Revised Statutes as they relate to criminal prosecution?

A Would you re-phrase that statement?

46 Are you familiar in a general way with the provisions of the Kentucky Revised Statutes as they relate to criminal prosecution?

A Well, the only procedure I know, I can follow through the books we have up there now. Whether that answers your question or not, I don't know.

47 Do you have a copy of the Kentucky Revised Statutes in your office?

A Yes, sir.

48 Are you familiar with the Court system of the Commonwealth of Kentucky as established by the Constitution of Kentucky?

A Not altogether.

49 Are you familiar with a set of books known as the Kentucky Digest published by the West Publishing Company?

A The Kentucky Digest?

50 Do you know what that set of books is and what it's for?

A No, not off hand, I couldn't.

51 Are you familiar with a set of books known as the Kentucky Decisions published by the West Publishing Company?

A I couldn't tell you, Mr. Goss, who published them or anything else. All I know is how to go through the index and look up what I want.

52 What is your understanding with respect to the usefulness of the case decisions published by the Court of Appeals of Kentucky?

MR. WIX UNTHANK: Your Honor, I'd like to object and renew my objection.

MR. EUGENE GOSS: Judge, I've got about four or five more questions left.

THE COURT: Can't you stipulate all this?

MR. WIX UNTHANK: Yes, sir.

THE COURT: All right, fix you up a stipulation.

MR. EUGENE GOSS: Your Honor, I think I could finish my questions faster than we could stipulate it.

MR. WIX UNTHANK: Well, I'd like to renew my objection.

53 Do you know the usefulness of those, the decisions of the Court of Appeals of Kentucky?

A Do I what?

54 Do you know why the decisions of the Court of Appeals are useful in the administration of law?

A I can say misrepresentation of justice.

55 Are you familiar with the Supreme Court reports of the United States Supreme Court?

A I'm familiar with some of them, but I don't agree with all of them.

56 What is your understanding with respect to the effect that a Judge should give between conflicting rulings made by the Court of Appeals of Kentucky and the Supreme Court of the United States?

A I didn't hear that, Mr. Goss.

57 What is your understanding with respect to the effect that a Judge should give between conflicting rulings made by the Kentucky Court of Appeals and the Supreme Court of the United States of America? Do you understand the question?

A No, I really don't. I don't think I know, if it would

go to the Supreme Court from the Kentucky Court of Appeals. Is that what you're referring to?

58 Yes.

A Well, I just don't—as I say, there's a lot of cases the Supreme Court rules on I don't agree.

59 Are you a licensed lawyer?

A No, sir.

60 Judge, is it fair to say that you have only a very vague knowledge of the criminal law of the Commonwealth of Kentucky and United States of America with respect to the Constitutional and statuatory rights that a defendant has and with respect to the enforcement of those rights; and with respect to criminal procedures of criminal law as it relates to criminal trials. Is that a fair statement?

A I'd say—no, I'd say I've got very little as far as back ground, but I've got a whole lot of common sense, Mr. Goss.

61 Now, did you bring with you the order book?

A Yes, sir.

62 From the city of Lynch relating to a trial of the defendant—the petitioner, Lonnie North?

A I brought the criminal docket with me which I docketed it in the book and I also have the warrant and the breathelizer test.

63 Do you have here with you a copy of the warrant which you served on this man?

A Yes, sir.

64 And this warrant was signed by you on the 12th day of July, 1974?

A Yes, sir.

65 And in that warrant you accused him of "driving while intoxicated." Is that correct?

A Yes.

66 And you admitted the petitioner to bail in the sum of $175.00?

A Yes, sir.

67 Was that a cash bond?

A No, sir. Mr. North there, his name is on that. It's Eli North.

MR. EUGENE GOSS: Judge, we'd like to have a copy of this complaint filed with the stenographer and mark it "Judge Russell, Exhibit 1."

THE COURT: All right, have a copy made.

68 Now, you set trial on this man's case on what day?

A 18th.

69 18th of July?

A Yes, sir.

70 And on the 18th of July, did he appear in your Court?

A Yes, sir.

71 At what time?

A He was about forty minutes late, thirty five or forty minutes late.

72 What time did your Court take up?
A 7:00.

73 You mean they were late getting there?
A Mr. North here, Lonnie North was late getting there, Mr. Goss.

74 Did you, in connection with the trial of his case, give him a jury trial?
A No, sir.

75 I believe his plea was not guilty, wasn't it?
A Yes, sir.

76 And he voiced that plea in your presence and in open Court?
A Yes, sir.

77 And you proceeded then to try him yourself?
A Yes, sir.

78 Was there an evidential hearing of any kind?
A You want me to proceed to tell you how it was I started with?

79 No, I just want to know if you held, before passing judgment on him, did you hold any kind of evidential hearing?
A Yes, sir.

80 What kind of an evidential hearing did you hold?

A Well, I sworn the arresting officer in and let him tell his story without any questions from me, let him tell his part, you know, his part in it, in the arrest. When I got through, I asked Mr. North if he had anything and he said, "Yes." I asked him if he wanted—any questions he wanted to ask Mr. Potter and he said, "Yes." So he proceeded to ask him questions and when he got through, I asked him if he was through, and he said, "Yes."

81 And that's when you proceeded to find him guilty?
A Yes, sir.

82 Did you—what judgment did you make in the case?
A What sentence did I put on him?

83 Right.
A $150.00 and thirty days in jail and revoked his driver's license.

84 Now, do you have a judgment you prepared and entered into your order book, any kind of a judgment in which he is — in which that becomes the judgment of your Court?
A Yes, sir, in this docket book.

85 All right, would you find that in the docket there for me.
A Page 139, Item 411, I mean 410.

86 Would you read that, every word of that judgment to the Court?
A "On a DWI, license revoked, sentence to thirty

days in jail, fine $139.50, costs $10.50, total of $150.00. 18th day of July, 1974."

87 And that's all you've got?

A And this is my signature.

88 That's all you have on your book?

A Yes, sir.

MR. EUGENE GOSS: Judge, we'd like to enter a copy of that in to the record.

THE COURT: I don't know how you're going to make it. I think she's got the substance of it.

MR. EUGENE GOSS: All right. If the judgment as entered into the record is sufficient, do you have any objection to that, Mr. Unthank?

MR. WIX UNTHANK: No objection.

CROSS EXAMINATION BY MR. WIX UNTHANK:

1 Mr. Russell, how long have you lived at Lynch?

A Well, I was born in Lynch and I moved in 1947, 46 years old in 1947, and I moved and came back to Lynch, three years prior —

2 Well, is it a fair statement to say you've been there approximately forty years or something like that?

A Forty three years.

3 Now, what class city is Lynch?

A Fifth class.

MR. WIX UNTHANK: Mr. Goss, may it be stipulated in the record that Lynch is a fifth class municipal corporation under the laws of the State of Kentucky?

MR. EUGENE GOSS: Yes, sir.

MR. WIX UNTHANK: And that as such the statutes provide for the office of police judge for the city of Lynch?

MR. EUGENE GOSS: That's in my pleading.

MR. WIX UNTHANK: Now, is it also agreed and stipulated that driving while under the influence of intoxicating beverages is a statuatory crime in the State of Kentucky?

MR. EUGENE GOSS: Right.

MR. WIX UNTHANK: And as such, the police court of the fifth class city would have jurisdiction of this charge?

MR. EUGENE GOSS: Jurisdiction is conferred upon the police court, by the statutes.

MR. WIX UNTHANK: Now, is there any question concerning the legality of his arrest upon this charge by the officer?

MR. EUGENE GOSS: No.

MR. WIX UNTHANK: Then it is stipulated

that he was legally arrested and charged with this offense?

MR. EUGENE GOSS: That isn't brought into issue in our petition.

MR. WIX UNTHANK: No, but can it be stipulated?

MR. EUGENE GOSS: Yes.

4 Now, Mr. Russell, going back to the time that the officer came up there with the defendant, did the defendant demand a jury trial?

A The night of the hearing, is that what you're talking about?

5 Yes, sir. The night that you tried the case, did he demand a jury trial?

A He said, "not guilty." Yes, he wanted a trial by jury.

6 He said he was not guilty?

A Yes.

7 And he asked for a trial by jury?

A By the jury, yes.

8 Now, I believe you stated that you depended on the county attorney to tell you what the law was — I mean your city attorney to tell you what the law was?

A Yes, sir.

9 The city attorney of Lynch is William R. Forester?

A Yes, sir.

10 He is a member of the Harlan County Bar Association, is he not?

A Yes, sir.

11 And he's been practising law in Harlan County quite a bit?

THE COURT: Can you stipulate that Mr. Forester is competent?

MR. EUGENE GOSS: Yes, sir.

12 Now, Mr. Forester tells you what the law is but he does not tell you how to interpret it, does he?

A No, sir. He tells me, like you said, what the law is, you know. In other words, where I've got jurisdiction and like I stated awhile ago, if I have any doubt, I call our attorney. I want to be right.

13 As to how you're going to do something, you determine that yourself after he tells you what it is?

A Yes, sir.

REDIRECT EXAMINATION BY MR. EUGENE GOSS:

1 Did you empanel a jury there when he was tried?

A No, sir. We had no jury trial.

2 Prior to the commincement of the hearing which you said that you had there, did you advise the petitioner that he had a right to trial by jury, and that he had the right to introduce evidence in his own behalf and to confront the witnesses against him?
A I think so. That's usually the procedure.

3 Did you advise him that he had a right to have an attorney present to represent him in this matter?
A Yes.

4 You advised him that he had that right?
A I'm pretty sure, Mr. Goss. I'm not going to say. That's usually the standard procedure.

5 Did you advise him that he had a right, in so many words or these direct words, did you advise him in words or substance that he had the right to introduce witnesses in his own behalf?
A He had no witnesses.

RECROSS EXAMINATION BY MR. WIX UNTHANK:

1 Mr. Russell, if I may, prior to after taking his plea, did you make a telephone call to the city attorney?
A Yes, sir.

2 And I believe after you made the telephone call, you were under the impression or believed which you received the advice, that he did not have to have a jury trial. Is that correct?
A That's right.

REDIRECT EXAMINATION BY MR. EUGENE GOSS:

1 And you followed that advice?
A Yes, sir.

2 Did Mr. North have an attorney present there to represent him when you tried this case?
A No.

WITNESS EXCUSED.

THE PETITIONER,
LONNIE NORTH,
WHO, HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION BY MR. EUGENE GOSS:

1 State your name.
A Lonnie North.

2 Lonnie, how old are you?
A Twenty three.

3 You reside at Lynch, Kentucky?
A Yes, sir.

4 And you were residing at Lynch on Wednesday, July 10,1974?
A Yes, sir.

5 Is that the day that you were detained by the chief of police of Lynch, Kentucky?
A Yes, sir.

6 Who was that?
A Ralph Potter.

7 Ralph Potter?
A Yes, sir.

8 And how long were you detained by the chief of police?
A About a half an hour.

9 And what happened to you after that period of detention?
A He took me to city hall and he said he'd stopped me for the Cumberland Police Department. They had a warrant for me and he was going to hold me until they come and pick me up.

10 Did they come and pick you up?
A Yes, sir.

11 And then they took you to Cumberland?
A Yes, sir.

12 Did they charge you with any offense in Cumberland?
A Reckless driving.

13 Was any dispensation made of that case?
A Yes, sir. I went to Court and paid the fine.

14 Then you were — what happened to you after you were charged at Cumberland, Kentucky?

A Well, while I was down there, they called and wanted to know what they was going to do with my motorcycle, and when I got loose from down at Cumberland and I went up there to get it, and when I went up there, they had a warrant for me, arrested for DWI.

15 And then you made bond?
A Yes, sir.

16 And you went there for trial on July 18, 1974?
A Yes.

17 When you went there to the courtroom, did you arrive on time?
A I was outside there. My dad went in and talked to him.

18 You were outside the courtroom?
A Yes, sir.

19 Had you been inside the courtroom at this point of time?
A No, sir.

20 Were you at the door of the courtroom?
A Yes, sir.

21 You were there and available at all times when your case was called?
A Yes, sir.

22 When your case was called for trial, did you immediately then make your appearance?

A No.

23 Well, what did you do?

A He was inside and he told me he'd come back out and tell me when they wanted me.

24 Now, when you did go into the courtroom, just explain to the Judge precisely what happened and what the procedures were surrounding your trial there?

A I went in to the courtroom, sit down and he swore Mr. Potter in, let him give his testimony, exactly what happened that night, and he turned around and asked me how I plead, and I said, "not guilty." He told me he'd give me a jury trial if it took him all night.

25 Now, you mean that he asked Mr. Potter, Chief Potter, what happened before he took your plea?

A Yes, sir.

26 And after he took your plea, is that when he said he would give you a jury trial?

A Yes, sir.

27 Did you want a jury trial?

A Yes, sir.

28 Did you ask for a jury trial?

A Yes, sir.

29 Then, after he went out, he then came back?

A Yes, sir.

30 And what did he say then?

A He said he had called an attorney and he didn't have to give me no jury trial. He was going to pronounce sentence on me himself.

31 Then, was a hearing commenced?

A No, sir.

32 Were any witnesses ever sworn?

A No, sir.

33 Was any testimony ever taken by the Court after you entered your plea?

A No, sir.

34 Did you have a lawyer present?

A No, sir.

35 Were you advised of any of your Constitutional rights, that is your right to trial by jury, your right to have counsel present, your right to confront the witnesses against you and your right to introduce evidence on your own behalf?

A No, sir.

36 Did you have any kind of an evidential hearing there whatsoever?

A No, sir.

37 The closest thing you had to any evidence was when — had some little conference prior to your giving your plea, he asked the police chief what had happened and what the charges were about? Is that a fair statement?

A Yes, sir.

38 Were you ever sworn and were you ever given an opportunity to present in testimonial form at a hearing, your side of your case?

A No, sir.

39 What happened to you then after he said, "I'm going to pronounce sentence on you?"

A He said he sentenced me to thirty days in jail, revoked my license and fined me $150.00.

40 Then what happened to you?

A He wrote out a slip and gave it to Mr. Potter and told him to bring me to Harlan.

41 Did they—did he bring you to Harlan?

A Yes, sir.

42 Where did he lodge you?

A In the county jail.

43 How long did you stay at the county jail?

A From Thursday night at 9:00 to Friday afternoon at 3:00.

44 And you only got out of jail when the court signed the writ in this case?

A Yes, sir.

45 And fixed bail for you?

A Yes, sir.

46 Did you then get out on bail?

A Yes, sir.

47 And have you been on bail since that time?

A Yes, sir.

48 If I understand it correctly, you did enter a plea of not guilty?

A Yes, sir.

49 You did request a jury trial?

A Yes, sir.

50 You wanted a trial?

A Yes, sir.

51 You did not have a lawyer present to represent you?

A No, sir.

52 You were not advised of any of your rights?

A No, sir.

53 You had no evidential hearing?

A No, sir.

CROSS EXAMINATION BY MR. WIX UNTHANK:

1 And you didn't give any testimony?

A In my behalf? He asked me what—did I have any questions I wanted to ask and I asked him for what purpose was I there because they had arrested me for DWI earlier that night when they detained me or was it because that they wanted to hold me for the Cumberland City Police.

2 What do you mean for the Cumberland City Police?

A That's the reason he said he detained me to start with because that the Cumberland City Police had a warrant for me.

3 Why did the Cumberland City Police have a warrant for you?

A They said that the motorcycle had out run the law, and they swore the warrant out for me.

4 This was for a different date from the arrest — the officer arrested you, wasn't it?

A The same night. Identically, the same night.

5 Now, the officer when they took you up there and charged you, they didn't charge you with being down in the City of Cumberland, did they, they charged you with being up in Lynch?

A That's right.

6 So the offense in Cumberland would have been for something that would have happened in Cumberland. The

offense in Lynch was for something that happened in Lynch?

A Well, I'm just telling you exactly what he told me why I was detained to start with.

7 Well now, did you tell them your side of it—what happened?

A What do you mean?

8 Just what I said. Did you tell them your side of it, what happened?

A I didn't have no side. As far as I can see, they had no right—I shouldn't have been detained to start with.

9 All right, did they ask you what happened and did you tell them — the officer told what happened as he saw it, did you tell what happened as you saw it?

A No, sir.

10 You did not give any explanation whatsoever?

A I told them I wouldn't guilty.

11 Well, did you tell them why you weren't guilty?

A Because I wouldn't.

12 Did you tell them why?

A No.

13 You did not make any offer of explanation whatsoever?

A No, sir.

14 Now, the Judge was present at that time, wasn't he?

A That's right.

15 The officer was present at that time, wasn't he?

A That's right.

16 And they will know whether or not you offered any explanation as to the arrest?

A I didn't offer one.

17 Now, did you have any witnesses you wanted to be there?

A No, sir.

18 You did not have any witnesses to be summoned at all, did you?

A No, sir, not to court.

WITNESS EXCUSED.

THE PETITIONER CALLED AS A WITNESS,

ELI NORTH,

WHO, HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION BY MR. EUGENE GOSS:

1 State your name.

A Eli North.

2 Where do you live?

A Cumberland, Kentucky.

3 Were you present in the city courtroom at the City of Lynch, Kentucky, when Lonnie North was sentenced by Judge Russell?

A I was.

4 On a charge of driving while intoxicated and given thirty days in jail and $150.00 fine and driver's license suspension?

A Yes, I was.

5 Would you describe in your own words what happened from the time that Lonnie North went into the courtroom until he was taken to jail?

A Well, I went in first and talked to Mr. Russell. I asked him —

6 I'm not interested in that. I'm just interested in what happened there after Lonnie came in to the courtroom?

A Well, I walked in the courtroom and he asked me — he told Lonnie he was going to sentence him. He said, "What have you got to say," and he said, "I'm not guilty." He said, "I'm going to sentence you. I'm going to give you $150.00 fine and thirty days in the county jail," and he said, "and revoke your driver's license," and he said, "where are your driver's license at?"

7 Was any trial held?

A No. There weren't any trial.

8 No trial whatsoever?

A No trial whatsoever.

9 Lonnie did plead not guilty?

A He did.

WITNESS EXCUSED.

THE PETITIONER CALLED AS A WITNESS,

TERRY CRECH,

WHO, HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION BY MR. EUGENE GOSS:

1 State your name.

A Terry Creech.

2 Mr. Creech, were you present in the courtroom on July 18, 1974, in city court at Lynch, Kentucky, when Lonnie North was sentenced on a charge of driving while intoxicated?

A Yes, I was.

3 What time of night did that take place?

A 7:00 court held.

4 Now, were you present there when Lonnie was asked for his plea?

A Yes.

5 From the point Lonnie went into the courtroom on

through the time that he was led out of the courtroom and on his way to jail, will you describe what happened?

A Well, I got there about 6:30 to the courtroom.

6 Was Lonnie there with you?

A Lonnie was outside.

7 All right, go ahead.

A I went inside, he didn't, like he said. I went inside about 6:30. He had about five cases before — four or five cases before he had Lonnie's. Lonnie's was the last one on the list.

8 Go ahead.

A And when he called Lonnie's case, Lonnie was standing outside and he told everybody to come in. Lonnie come inside and Lonnie sit down and I sit down behind him, and C. B. Russell asked him did he know what he was here for and Lonnie said, "no, I don't." Not, you know, pertaining to everything. He said, "All I know about is the Lynch police held me for the Cumberland police," and he said, "Well, I'm going to charge you with DWI," and Lonnie said, "Well, I plead not guilty."

THE COURT: What's DWI?

WITNESS: Driving while intoxicated.

THE COURT: All right.

A And Lonnie said—he never gave Lonnie no rights.

He never asked him did he want a lawyer or anything. He told —

9 Did he advise him of his right not to incriminate himself?

A No. He never advised him of nothing.

10 Did he advise him of his right to a jury trial?

A No.

11 Did he advise him of his right to a hearing?

A No. Well, this mean time, Mr. Potter was gone. He had left. There was another police officer standing there. I don't know his name, Red, something or another, and he said, "Where's Mr. Porter?" He said, "I want to get this over with," and somebody said Mr. Potter was gone down the road for something. He stayed gone about fifteen minutes, Mr. Potter did. At this time, he said, "I'm going to get a jury," and he had a Bible and something in his hand, and he throwed it down, and he said, "I'll get a jury if it takes me all damn night." He said, "if we have to stay here all night." Then Mr. Potter come back, the arresting officer. He swore him in. He asked him a few questions and he asked him if he was the arresting officer and Mr. Potter said, "Yes," and he held Lonnie there for the Cumberland law. He never give Lonnie no rights at all. He just sentenced him, charged him $150.00 and told him to take him to jail.

12 Now, were these questions asked Chief Potter before Lonnie's plea was taken?

A I don't believe so.

13 In connection with the hearing, was Lonnie given an opportunity to testify in his own behalf?

A Not the way he should have. All he asked him was, he said, "Do you know what you're here for?"

14 Was a jury ever empaneled?

A No, sir.

CROSS EXAMINATION BY MR. WIX UNTHANK:

1 Son, you said, when he said did he get a hearing, you said, "not the way he should have." What did you mean by "not the way he should have?"

A No, he asked me did he testify, testify the way he should have.

2 All right, but you answered "not the way he should have." What do you mean by "not the way he should have?"

A I thought he should have had a lawyer. I thought he should have been tried by a court.

3 What were you doing down there?

A What was I doing down there?

4 Yes, sir.

A I was just sitting in listening. That's my brother-in-law. I just like to listen.

5 How come you to know he was there?

A How come I to know he was there?

6 Yes.

A Cause he had court that night. I knowed that he was.

7 Now, when I ask you a question, do you always have to repeat the question that I ask you?

A No.

8 All right. Now, when did you first find out he had been arrested?

A Friday, after work. I worked third shift, U. S. Steel.

9 How did you find out he had been arrested?

A Talk around town. I stopped at his house when I got off from work.

10 Now, you aren't any stranger to court procedure, are you?

A What do you mean by that now? I don't understand what you're talking about.

11 Have you been — you've been in and out of court before, haven't you?

A No, sir.

12 What?

A A jury court?

13 No, in a city court up there?

A Oh, yes. Yes, one time.

14 Been in there more than once, haven't you?

A No, I haven't, not in Lynch court.

15 What about your brother-in-law that's on trial here, he's familiar with the procedures, isn't he?

A I couldn't tell you that. I don't know.

16 Now, you know of your own personal knowledge he's been in court, city court up there. more than once, hasn't he?

A I've never been in the courtroom with him.

17 What about Cumberland?

A Yes, for a speeding ticket, just like I've had a speeding ticket before.

18 All right, but you fellows on traffic offenses have been in and out of court up there quite a few times, haven't you?

A No, sir, not in Lynch.

19 What about Cumberland?

A No, sir.

20 Benham?

A No, sir, never been in Benham court.

21 Cumberland?

A Yes, sir, a speeding ticket.

22 What about a peace bond? Have you been on a peace bond?
A I was charged — I'll tell you. I've been charged with speeding and public drunkness one time.

23 Were you drunk that night?
A Public drunkness?

24 Were you drunk that night?
A Which night are you referring to?

25 The night that you were there in the courtroom?
A No, sir. I had just got out of bed.

26 What shift do you work?
A Third shift, 12:00 to 8:00.

27 What?
A 12:00 to 8:00, 12:00 at night, get off at 8:00. I get home about 9:00.

28 You say that he never asked any questions of the lawyer — I mean he never asked any questions of the arresting officer?
A No, he asked Mr. Potter what took place that night.

29 Who?
A Mr. C. B. Russell.

30 All right, talking about the defendant.
A Lonnie?

31 Lonnie never asked any questions of the officer, he never told the Judge what happened, he never told the Judge his side of it?
A He asked for a trial by jury is all I know. That's all I can state.

32 Did he ever—did the Judge ask him if he had any questions he wanted to ask?
A I didn't hear him say that.

33 Are you saying he did or he didn't or you just didn't hear it?
A I'm just saying I didn't hear it. I never heard him say that.

34 In other words, you're not saying you heard everything that went on in there, are you?
A Almost everything, not everything. I won't say I heard everything that went on.

WITNESS EXCUSED.

THE PETITIONER CALLED AS A WITNESS,

HAL WOODS,

WHO, HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION BY MR. EUGENE GOSS:

1 State your name.
A Hal Thomas Woods.

2 Were you present in the courtroom at the city of

Lynch, Kentucky, on July 18, 1974, about 7:00 when Lonnie North was sentenced to jail?

A Yes, sir.

3 By Judge C. B. Russell?

A Yes, sir.

4 Now, from the time that Lonnie North went into the courtroom and on up until the time that he was led out by Chief Potter on his way to jail, would you describe in your own words what took place there?

A He come in. Lonnie come in approximately around 7:30, 7:35. Mr. Russell stated that he was late when he come in. He pulled out a warrant and a breathelizer statement and he told Lonnie that he was charging him with DWI. Then he asked Lonnie how he pleaded. Lonnie stated that he pleaded not guilty. C. B. turned then and told Mr. Potter that he would need a jury. Mr. Potter stated back to C.B. that he couldn't get out to get no jury on account of he was the arresting officer.

5 Talking about Chief Potter?

A Yes, sir.

6 All right, go ahead.

A And Mr. Russell left the room and come back and told Lonnie that he didn't have to give him a jury trial because he had just referred to his lawyer and he told him that he could try the case himself. Then, he swore Mr. Potter in and he asked Lonnie if he had anything to ask Mr. Potter. Then Lonnie asked Mr. Potter a question, but I don't remember what it was. He was talking to Mr.

Potter and Mr. Russell. Then Mr. Russell told him he was trying the case and he was charging him $150.00, taking his license and giving him thirty days in the county jail as of starting right then.

7 Now, was Lonnie North ever advised of his right by the Court not to incriminate himself?

A I couldn't say. You can't hear everything in there. I was in the back and I do remember that much because it was the first part of the trial and Mr. Russell could have stated it to him, I don't know.

8 Did you hear him advise Lonnie North of any of his rights?

A No, sir. Well, just when he asked Mr. Potter—he swore Mr. Potter in and asked Lonnie if he wanted to ask Mr. Potter any questions.

9 Was Lonnie given an opportunity to testify himself during any kind of a hearing?

A Well, just the first part. He asked him how he pleaded. Then he asked if he wanted to ask Mr. Potter any questions.

10 And that was the extent of the hearing?

A Yes.

11 That was the extent of the transaction there and the trial of this man?

A Yes, sir. Well, Mr. Russell stated that he had called his lawyer and he had a right—he had been advised by his lawyer that he could try the case.

WITNESS EXCUSED.

MR. EUGENE GOSS: Your Honor, that's the case.

THE COURT: Well, gentlemen, reading this case of writ of habeaus corpus, I find that the gravity of this pleading is that Judge C. B. Russell is not qualified by lack of education and training in the field of law, and I've just had an experience with a situation like this with the case against the City Judge of Harlan, Stanley Ditty. The Court of Appeals held that it wasn't necessary to be trained in the law to be the Judge in a fourth class city, and the fifth class city would be, by virtue of population, one step lower. I'm quite sure it was analogous to the fourth class city Judge's educational requirements are.

I thought I was right in the Ditty case, but the Court of Appeals said I wasn't. I'm not going to be put in a position of going against the mandate of the Court of Appeals of Kentucky that says the Judge of the lower court without legal training, without legal background, without being an attorney, any education or special training isn't qualified. I'm going to refuse to grant the relief sought under the writ.

You can draw an order, Mr. Goss.

MR. EUGENE GOSS: Your Honor, I have prepared a notice of appeal which I lodge with the court at this time, and I presume the petitioner will remain under the same bond.

THE COURT: Yes, let him remain under bond until it's finally decided. I think it would be wise before you file your notice of appeal that you put a judgment on.

MR. EUGENE GOSS: I'm going to do it today, Your Honor.

MR. WIX UNTHANK: Mr. Goss, I'm advised by the city attorney, that the court might upon his own motion, set aside that judgment and allow a new trial upon this matter.

MR. EUGENE GOSS: Trial before this man? That's what we're raising in this law suit. Now, they're talking about re-setting it.

MR. WIX UNTHANK: What I think then, I think that he should make a motion.

MR. EUGENE GOSS: Well, who's going to pay this man for the day he spent in jail?

MR. WIX UNTHANK: I mean I'm going to advise the city up there, Mr. Goss.

MR. EUGENE GOSS: Well, we didn't raise that question in our pleadings and that isn't the relief we've asked for.

Your Honor, I'll draw the judgment.

STATE OF KENTUCKY

COUNTY OF HARLAN

I, Molly Sue Baker, Official Court Reporter of the Harlan Circuit Court in July, 1974, hereby certify that the foregoing transcript is a true and correct record of all evidence introduced and heard, or offered to be introduced and rejected, of all objections of counsel thereto, all motions, avowals and all other proceedings had on the trial of this case.

Given under my hand this the 1st day of August, 1974.

/s/ Molly Sue Baker
MOLLY SUE BAKER
Official Court Reporter
Harlan Circuit Court
Harlan, Kentucky

IV. Opinion of the Trial Court

HARLAN CIRCUIT COURT
CIVIL ACTION NO. 2093

LONNIE NORTH ..... PETITIONER

VS: OPINION AND ORDER

C. B. RUSSELL; NATHANIEL "TRAP" HELTON, Jailer of Harlan County ..... RESPONDENT

The Petition for Writ of Habeas Corpus in this case came on for hearing on July 23, 1974 at the hour of 9:00 A.M. in the Harlan Circuit Court Room, Harlan, Kentucky, Edward G. Hill, presiding, and the Petitioner, Lonnie North, represented by his counsel, Eugene Goss, having appeared and announced ready and the Respondents, C. B. Russell and Nathaniel "Trap" Helton, having appeared and having announced ready, an evidentiary hearing was held by the Court, in which the Petitioner, Lonnie North, presented testimonial evidence from witnesses from which evidence it patently appears that the allegations for the Petition for Writ of Habeas Corpus are substantially true.

It is the sole contention of the Petitioner in his Writ that he is restrained of his liberty without lawful authority, for the reason that he was "tried" by a lay judge who was constitutionally disqualified from presiding in his case for the reason that the "trial judge" does not have the competency and the capacity to accord to the Petitioner his constitutional, statutory and common-law substantive and procedural rights which are accorded to him as a citizen

of Kentucky and as a citizen of the United States. The Petitioner assigns in his Petition as grounds for his release:

(1) That KRS 26.010 and KRS 26.200, conferring criminal jurisdiction upon cities of all classes and fixing the qualifications of police judges in cities of the 5th and 6th classes, deny to the Petitioner equal protection of the laws for the reason that such statutes permit a citizen in a 5th class city to be tried by a judge ignorant of the law while the same citizen residing in a 1st or 2nd class city is provided with a judge which is minimally qualified as a practicing lawyer;

(2) Also KRS 26.200 fixing the qualifications of police judges in cities of the 5th class deny to the Petitioner his right to due process of law under the Fourteenth Amendment for the reason that Respondent, C. B. Russell, holding office under such statute, is unable by training, knowledge and experience to accord to him his constitutional, statutory, and common-law substantive and procedural rights accorded to him as a citizen of Kentucky and of the United States of America, and;

(3) That the trial judge, C. B. Russell, is a "lay judge" who has no training in the law and who has not acquired either by formal education, training or experience sufficient body of knowledge relating to Petitioner's rights as to enable him to accord to Petitioner all of his constitutional, statutory and common-law substantive and procedural rights.

It must be said that the Petitioner has grounded his Petition for Writ of Habeas Corpus solely upon the

grounds of the judge's disqualifications by reason of the judge's alleged incompetency and incapacity to accord to him a fair trial. The adequacy of the proceedings themselves to accord to the Petitioner his constitutional rights are not raised in the Petition, and the Petitioner grounds his right to release solely upon what he terms to be the constitutional incapacity or constitutional disqualifications of the trial judge for the reasons above stated.

The issues presented in this Writ are similar to those issues presented in the case of *Ditty* v. *Hampton* 490 *SW2d 772* (*Ky.* 1973), wherein the Court of Appeals reversed a holding by this Court that an accused in a criminal case may not be tried by a tribunal presided over by a judge who is incapable by reason of training, experience and knowledge to accord the Petitioner a fair hearing in which he is accorded all of his rights as a citizen of Kentucky and as a citizen of the United States of America. The occurrences in this case again indicate the basic falacies in a judicial system which allows persons of insufficient training, knowledge and experience to preside at criminal trials which, inherently, require a great deal of training, knowldege, and experience, in order that each citizen be accorded the rights guaranteed to him under the law.

Obviously, the Petitioner has intentionally grounded his request for release upon the limited constitutional grounds hereinabove set forth. This Court does not feel that it should or can go beyond the Petitioner's pleadings and the evidence and accord relief to the Petitioner in a form different from that relief which he is seeking. It would be easy enough in this case for the Court to hold that, under the evidence, the Petitioner has been denied

even his most basic constitutional rights, and order him released from custody. However, he might find himself again facing the same tribunal presided over by the same judge, which would be a wholly inadequate relief of a kind completely different from that which he seeks in this proceeding.

The Court, under the rule in the *Ditty* case, *supra,* is constrained to dismiss the Petition for Writ of Habeas Corpus and to deny the relief requested by the Petitioner, but does so upon the narrow ground that the Fourteenth Amendment to the Constitution of the United States of America does not prohibit the trial of the Petitioner by the Respondent, C. B. Russell, as the duly constituted and presiding judge of the City of Lynch, Kentucky, a city of the 4th class, irrespective of the said trial judge's knowledge or lack of knowledge of the Petitioner's rights as a citizen of Kentucky and as a citizen of the United States of America, and irrespective of the ability or inability of the said judge to accord to the Petitioner those rights which he, as a citizen of Kentucky and as a citizen of the United States of America, holds under the laws of the Commonwealth of Kentucky and under the Constitution of the United States of America. In the making of such ruling, the Court reluctantly dissolves the Writ of Habeas Corpus heretofore issued, and orders the Petitioner remanded to the custody of the Harlan County Jailer.

Provided, however, should the Petitioner file a Notice

of Appeal, within the time allowed by the pertinent rules, indicating his intention to appeal this case to the Court of Appeals of Kentucky, he shall remain free under the bond previously executed by him.

This 25 day of July, 1974.

/s/ Edward G. Hill
EDWARD G. HILL, JUDGE
HARLAN CIRCUIT COURT

V. First opinion of the Kentucky Court of Appeals
RENDERED: AUGUST 12, 1974

COURT OF APPEALS OF KENTUCKY

LONNIE NORTH ..... APPELLANT

V. APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE EDWARD G. HILL, JUDGE
C.A. # 2093

C. B. RUSSELL; NATHANIEL "TRAP" HELTON, Harlan County Jailer ..... APPELLEES

PER CURIAM - AFFIRMING

This is an appeal from a judgment of the Harlan Circuit Court denying relief by way of habeas corpus from a judgment of the Lynch Police Court. Appellant's contention is that the police court judgment is void because the police judge is not a lawyer.

The motion for appeal is granted and the judgment is affirmed. cf. Ditty v. Hampton, Ky., 490 S.W.2d 772 (1973).

There being no authority for the granting of bail pending an appeal from the denial of habeas corpus, that portion of the judgment permitting the appellant to remain free on bond was erroneous, cf. Crady v. Cranfill, 371 S.W.2d 640, (1963), and should be corrected forthwith. That the appellant is not entitled to bail in this proceeding does not, however, affect his entitlement, *vel non*, to bail in the event of an appeal from the judgment of the Lynch Police Court.

As corrected in accordance with this opinion, the judgment is affirmed.

Reed, Acting Chief Justice, and Jones, Milliken, Palmore and Steinfeld, JJ., sitting. All concur.

VI. Second Opinion of the Kentucky Court of Appeals.

Rendered: March 21, 1975

COURT OF APPEALS OF KENTUCKY

74-723

LONNIE NORTH ..... APPELLANT

V. APPEAL FROM HARLAN CIRCUIT COURT
HON. EDWARD G. HILL, JUDGE
CIVIL ACTION NO. 2093

C. B. RUSSELL; NATHANIEL "TRAP" HELTON, Harlan County Jailer ..... APPELLEES

OPINION OF THE COURT BY JUSTICE PALMORE

AFFIRMING

This proceeding began with a petition for habeas corpus filed in the Harlan Circuit Court by the appellant, Lonnie North, against the appellees, C. B. Russell, police judge of the City of Lynch, and Nathaniel "Trap" Helton, jailer of Harlan County. North alleged that he was being detained in the county jail pursuant to a judgment of the police court finding him guilty of drunk driving[1] and fixing his punishment at 30 days in jail and a fine of $150.[2] Entitlement to relief by way of habeas corpus was asserted on the theory that because the statute prescribing the

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[1]KRS 189.520

[2]KRS 189.990 (10) (a.).

qualifications of police judges in fifth and sixth-class cities[3] do not require any legal training or knowledge, and because Judge Russell is a "lay" judge, unlearned in the law, the action or judgment by which North was committed to jail violated his rights of due process and equal protection of the laws under the 14th Amendment and was void.

Though sympathetic to North's constitutional argument, the trial court relied upon *Ditty* v. *Hampton*, Ky., 490 SW 2d 772 (1973), in denying relief, and the judgment was affirmed by this court in *North* v. *Russell*, Ky., 516 SW 2d 103 (1974). North then appealed to the United States Supreme Court.

In response to a jurisdictional statement and brief filed in the Supreme Court by North the Attorney-General of Kentucky filed a motion to dismiss or affirm in which the following footnote appeared:

> "The uncontested facts of this case establish that appellant requested but was denied a jury trial. Under Kentucky law he was entitled to the jury trial he requested. KRS 26.400(4). Further it appears that Judge Russell mistakenly imposed a sentence of imprisonment upon appellant for a first offense of driving while intoxicated, whereas imprisonment is not an authorized punishment for first offenders but can be imposed only upon commission of a subsequent offense. KRS 198.990(10 (a). Accordingly appellee must concede that appellant should have been granted the writ of habeas corpus for which he filed. How-

[3]KRS 26.200.

ever, appellant has never requested that a Kentucky court grant him relief to which he is entitled under Kentucky law, but has on the contrary consistently demanded that he be granted a writ of habeas corpus on the ground that the Kentucky police court system is in violation of the U.S. Constitution. It is appellee's position that even should this Court note probable jurisdiction over the constitutional issues which appappellant raises, it should nonetheless refrain from deciding the federal questions involved in this case and remand the case to the Kentucky Court of Appeals for that Court's consideration of whether or not appellant should be granted a writ of habeas corpus solely upon the basis of violations of Kentucky law which occurred in the course of appellant's trial before the Lynch Police Court."[4]

On the basis of this footnote the Supreme Court has vacated our judgment in *North* v. *Russell*, supra, and remanded the case "for further consideration in light of the position presently asserted by the Commonwealth," to the utter consternation of the appellant, who of course is interested only in the constitutional issue and vigorously contests the suggestion that he be granted relief on another and less spectacular ground. The result is that we find

[4]Since there is no official record of the proceedings in the Lynch Police Court, the Attorney General's understanding that the alleged offense was the appellant's first appears to be an assumption. It is neither alleged nor conceded to be a fact.

ourselves performing an unwilling and not altogether felicitous role in a judicial fan dance.

Appellate courts have more to do than deal with errors of which appealing parties make no complaint. It is elementary that errors of which an aggrieved party is perfectly well aware but which he chooses not to bring to the attention of the court are waived. The blunt fact is that this appellant wants only to test the constitutional status of lay judges in criminal cases, whereas the Attorney-General has no appetite for that particular field of battle.

We fully appreciate the absurdity of having a lawsuit — any lawsuit — presided over in this day and age by a person without legal training or experience. Nevertheless, it was our conclusion in *Ditty* v. *Hampton*, Ky., 490 SW 2d 772 (1973), that the federal constitution does not deny the people the right to have it that way if they so desire. Moreover, when this habeas corpus proceeding began and when it was decided in this court there was still time in which the appellant could have secured a trial *de novo* in the Harlan Circuit Court by the simple expedient of an appeal from the judgment of the Lynch Police Court. KRS 23.032; RCr 12.02 - 12.06, incl. Cf. *Colten* v. *Kentucky*, 407 U.S. 104, 112 (1972).

The constitutional issue was and is the only issue before us, and we have decided it adversely to the appellant. So again, the judgment is affirmed.

All concur.

VII. Statement of Questions Presented by Appellant in Brief before the Court of Appeals of Kentucky

COURT OF APPEALS OF KENTUCKY

FILE NO. 74-723

LONNIE NORTH ..... APPELLANT

VS:

C. B. RUSSELL; NATHANIEL "TRAP" HELTON, Harlan County Jailer ..... APPELLEES

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE EDWARD G. HILL, JUDGE

BRIEF FOR APPELLANT

EUGENE GOSS
Central Street
Harlan, Kentucky

ATTORNEY FOR APPELLANT

This is to certify that pursuant to RCA 1.250 a copy of the within Brief has been served by mail on: Honorable Wix Unthank, Attorney at Law, Harlan, Kentucky, Attorney for Appellees; Honorable Ed W. Hancock, Attorney General, Commonwealth of Kentucky, Frankfort, Kentucky 40601; and to Honorable Edward G. Hill, Judge, Harlan Circuit Court, Harlan, Kentucky 40831, this the 5 day of August, 1974.

/s/ Eugene Goss
EUGENE GOSS
Counsel for Appellant

STATEMENT OF QUESTIONS PRESENTED

I

IS THE STATUTORY SCHEME EMBODIED IN KY. REV. STAT. 26.010, 26.140, 26.150 (1), AND 26.200 INVALID UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION INSOFAR AS THESE STATUTES SUBJECT THE APPELLANT, A CRIMINAL DEFENDANT CONVICTED IN CITY COURT IN A FIFTH CLASS CITY, TO TRIAL BEFORE A JUDGE UNTRAINED IN THE LAW AND UNFAMILIAR WITH THE SUBSTANTIVE AND PROCEDURAL RIGHTS GRANTED THE APPELLANT BY THE LAWS OF THE UNITED STATES AND THE COMMONWEALTH OF KENTUCKY, WHEREAS A CRIMINAL DEFENDANT ACCUSED OF IDENTICAL CRIMES IN COURTS OF IDENTICAL NAME AND TERRITORIAL AND CRIMINAL JURISDICTION IN A FIRST AND SECOND CLASS CITY IS ACCORDED A JUDGE TRAINED AS AN ATTORNEY?

II

DOES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION PROHIBIT THE TRIAL OF THE APPELLANT, A DEFENDANT CONVICTED OF MISDEMEANOR CHARGES ENTAILING BOTH FINE AND IMPRISONMENT, TO BE TRIED, CONVICTED AND INCARCERATED BEFORE A TRIBUNAL PRESIDED OVER BY A JUDGE WHO IS: (A) NOT COGNIZANT OR FAMILIAR WITH THE SUBSTANTIVE AND PROCEDURAL RIGHTS ACCORDED TO THE APPELLANT BY THE LAWS OF THE UNITED STATES AND THE COMMONWEALTH OF KENTUCKY AND (B) FULLY RELIANT ON THE CITY PROSECUTOR FOR LEGAL INFORMATION AND INTERPRETATION?

Supreme Court, U. S.
FILED
MAY 29 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1409

LONNIE NORTH ..... APPELLANT

VS:

C. B. RUSSELL and NATHANIEL "TRAP" HELTON, JAILER OF HARLAN COUNTY ..... APPELLEES

ON APPEAL
FROM
COURT OF APPEALS OF KENTUCKY

MOTION TO DISMISS OR AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1409

LONNIE NORTH ..... APPELLANT

VS:

C. B. RUSSELL and NATHANIEL "TRAP" HELTON, JAILER OF HARLAN COUNTY ..... APPELLEES

ON APPEAL FROM COURT OF APPEALS OF KENTUCKY

MOTION TO DISMISS OR AFFIRM

Appellees move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Court of Appeals of Kentucky on the ground that it is manifest that the issues on which the decision of the case depends do not present a substantial federal question.

STATEMENT OF THE QUESTIONS PRESENTED

WHETHER THE QUESTIONS IN THE INSTANT CASE RAISE SUBSTANTIAL FEDERAL QUESTIONS UNDER THE DUE PROCESS AND/OR EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT SO AS TO WARRANT REVIEW BY THIS COURT?

BEST COPY AVAILABLE

A. WHETHER TRIAL OF A MISDEMEANANT BEFORE A LAY JUDGE IS SO INHERENTLY UNFAIR THAT THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES ALL MISDEMEANOR CASES TO BE TRIED BEFORE JUDGES WHO ARE ATTORNEYS?

B. WHETHER KENTUCKY REVISED STATUTES 24.140, 26.150(1), and 26.200 ARE VIOLATIVE OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE THE STATUTES VARY THE QUALIFICATIONS JUDGES ARE REQUIRED TO MEET DEPENDING UPON LEGISLATIVE CLASSIFICATION OF JUDICIAL DISTRICTS ON THE BASIS OF POPULATION?

I. THE STATE STATUTES INVOLVED AND THE NATURE OF THE CASE.

A. THE STATE STATUTES

The statutes involved in this appeal are Kentucky Revised Statutes (hereinafter KRS) 26.010, 26.140, 26.150(1), 26.200, 189.990(10) (a), Constitution of Kentucky § 130 (see Appellant's Jurisdictional Statement, pp. 5-8), KRS 26.400(4) and Kentucky Rule of Criminal Procedure 12.06 (Appellees' Appendix "A"). The cumulative effect of these provisions is that all circuit judges and only judges of police courts in cities of the first and second classes must be lawyers; whereas, the judges of police courts in cities of the third, fourth, fifth and sixth classes need not be lawyers.

Section 156 of the Constitution of Kentucky and KRS 81.010 are also directly involved (see Appellees' Appendix "A"). This section of Kentucky's Constitution divides all of Kentucky's cities into six classes according to population, and is the basis of the classification of judges of police courts in the instant case:

100,000	population or more		FIRST CLASS
20,000 —	less than	100,000	SECOND CLASS
8,000 —	less than	20,000	THIRD CLASS
3,000 —	less than	8,000	FOURTH CLASS
1,000 —	less than	3,000	FIFTH CLASS
	less than	1,000	SIXTH CLASS

B. PROCEEDINGS BELOW

The appellant Lonnie North was convicted on July 18, 1974, in the Police Court of the City of Lynch, Kentucky, of the offense of driving while intoxicated. Appellee C. B. Russell, Judge of the Lynch Police Court, after finding appellant guilty, fixed appellant's sentence at thirty days in the county jail and a fine of $150.00. On July 19, 1974, appellant filed in the Harlan Circuit Court a petition for writ of habeas corpus. A writ was issued directing appellees Russell and Nathaniel "Trap" Helton, jailer of Harlan County, Kentucky, to produce appellant in circuit court. On July 23, 1974, the Harlan Circuit Court, Honorable Edward G. Hill, Circuit Judge, presiding, denied habeas corpus relief and remanded appellant to jail. On the same day, appellant filed his notice of appeal to the Court of Appeals of Kentucky and his designation of the record.

Lynch, Kentucky, is a fifth class city. KRS 81.010. KRS 26.200 does not require the police judge of a city of the fifth class to be an attorney. Appellee Russell is not a

licensed attorney. The appellant in his petition for writ of habeas corpus alleged that (1) the statutory plan which requires police judges to be attorneys in the more populated cities of the first two classes, while not making the same requirement applicable to rural towns of the fifth class, is in violation of the Equal Protection Clause of the Fourteenth Amendment; and (2) trial by a judge who is not an attorney inevitably deprives appellant of a fair trial in violation of the Due Process Clause of the Fourteenth Amendment.

The Court of Appeals of Kentucky, citing *Ditty* v. *Hampton*, Ky., 490 S.W.2d 772 (1973), dismissed for mootness, 414 U.S. 885 (1973), rejected appellant's contentions, affirmed the lower court's denial of writ of habeas corpus and set aside the provisions for appellant's bail pending appeal. *North* v. *Russell*, Ky., 516 S.W.2d 103 (1974). On appeal to this Court, the judgment of the Court of Appeals was vacated and the case remanded for further consideration. 95 S.Ct. 673 (1974). On remand from this Court, the Court of Appeals of Kentucky reaffirmed its prior holding. *North v. Russell*, Ky., ___ S.W.2d ___ (decided March 21, 1975). (Appellant's Appendix 1).

ARGUMENT

THE ISSUES RAISED IN THE INSTANT CASE DO NOT PRESENT SUBSTANTIAL FEDERAL QUESTIONS UNDER EITHER THE DUE PROCESS CLAUSE OR THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

A. APPELLANT PRESENTS NO SUBSTANTIAL FEDERAL QUESTION UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE HE HAS FAILED TO DEMONSTRATE THAT A REASONABLE LIKELIHOOD OR PROBABILITY OF UNFAIRNESS EXISTS IN A CRIMINAL MISDEMEANOR TRIAL PRESIDED OVER BY A JUDGE WHO IS NOT AN ATTORNEY.

The issue which appellant raised in the lower courts and which he now presents before this Court is whether the General Assembly of the Commonwealth of Kentucky has lawfully vested in a judge not required to be an attorney the power of presiding at a criminal misdemeanor trial held in the police court of a city of the fifth class. Appellant's contention is not simply that the appellee, Judge Russell, has denied appellant a fair trial through judicial errors made in this particular case, but instead appellant argues that the entire inferior court system of Kentucky denies him due process in that *any* criminal trial presided over by *any* non-attorney judge is inherently unfair. Therefore, appellant has not only the burden of establishing that his federal constitutional rights were violated in this specific instance, he must also demonstrate that such a denial is probable in all criminal cases which are to be heard by judges who are not attorneys. See *Estes* v. *State of Texas*, 381 U.S. 532, reh. den., 382 U.S. 875 (1965); *Re Murchison*, 349 U.S. 133 (1955).

The Kentucky Court of Appeals rejected contentions identical to those made by appellant herein in *Ditty* v. *Hampton*, supra. Two other states besides Kentucky — Arizona and Illinois — have rejected the contention that the Due Process Clause requires a trial before a judge who is an attorney. In *Crouch* v. *Justice of Peace Court of Sixth Precinct*, 7 Ariz. App. 460, 440, P.2d 1000 (1968), the court stated that the Due Process Clause does not require an attorney judge to instruct a jury as to matters of law in a criminal misdemeanor proceeding. And in *City of Decatur* v. *Kushmer*, 43 Ill.2d 334, 253 N.E.2d 425 (1969), the court stated that, in the absence of a constitutional or statutory requirement, a lay magistrate who presides over the jury trial of a criminal misdemeanant need not be an attorney, because trial before a lay magistrate is not per se a denial of due process. *Cf. California* v. *Gordon*, 525 P.2d 72 (Cal. 1974), cert. denied, 43 U.S. L.W. 3448 (U.S. Feb. 18, 1975).

It is true that this Court in a series of cases has disqualified mayors as judges for probable bias. However, these decisions were made on the basis that the mayors had a financial interest in the fines collected and not on the ground that they were non-lawyers. *Dugan* v. *Ohio*, 277 U.S. 61 (1928); *Tumey* v. *Ohio*, 273 U.S. 510 (1926); *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972). In *Shadwick* v. *City of Tampa*, 407 U.S. 345 (1972), this Court unanimously upheld a Florida law by which court clerks, who were not attorneys or judges, determined probable cause for the issuance of warrants. Such a determination was deemed within the capabilities of the layman

and not violative of due process if the layman was impartial and independent.

Appellant argues that since this Court has extended the right to counsel to accused in misdemeanor cases which may result in a loss of liberty, *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972), the Court should also require judges in such misdemeanor cases to be attorneys. The Kentucky Court of Appeals in rejecting the allegation that use of lay judges worked a denial of due process, *Ditty*, supra, distinguished the situation at bar from that in *Argersinger*, supra, by stating:

> ". . . The function of the court is not to defend the accused, or to represent him, but to decide fairly and impartially. An accused needs counsel to defend him, as pointed out in *Gideon* v. *Wainwright*, because the government employs lawyers to prosecute him—because our system of criminal justice is an adversary system. But the judge is not one of the accused's adversaries, and is not there either to defend or to prosecute him. So the fact that the accused needs a lawyer to defend him does not mean that he needs to be tried before a lawyer judge." 490 S.W. 2d at 775

Appellant contends that the right to counsel implies the right to a lawyer judge who can appreciate and digest the legal points being made by counsel. However, the fact that one is not an attorney does not mean that one cannot comprehend legal issues. There are literally thousands of legislators who are not attorneys and they actually write the laws and in so doing must deal extensively with

complex legal issues. In the *Shadwick* case, supra, this Court pointed out that:

> ". . . Our legal system has long entrusted non-lawyers to evaluate more complex and significant factual data than that in the case at hand. Grand juries daily determine probably cause prior to rendering indictments, and trial juries assess whether guilt is proved beyond a reasonable doubt. The significance and responsibility of these lay judgments betray any belief that the Tampa clerks could not determine probable cause for arrest." 407 U.S. at 351-352

Appellant further conjectures that there is a probability of bias on the part of non-attorney judges because they are likely to rely upon county attorneys or city prosecutors for legal advice. Appellees deny the validity of the urged inference. The fact that an individual judge — attorney or non-attorney — may subjectively look to, or be inordinately influenced by, an agent of the prosecution in making legal judgments does not reflect upon the system which allowed the judge to take office. Another judge selected by the same system might well depend exclusively on defense attorneys for guidance in deciding cases. The fact that a judicial system may require judges to be lawyers does not mean that the system will have good judges; and the fact that a judicial system may allow non-attorneys to serve as judges does not mean that system will have bad judges.

Appellant claims that:

> ". . . Judge Russell is a stark example of the prejudice encountered by a criminal defendant when tried by a lay judge. The North 'trial', however, cannot be singled out as unusual. The *probability* of an unfair hearing pervades Judge Russell's courtroom and . . . he should not be permitted to sit in criminal cases because of the *inherent probability* that all criminal defendants facing trial in his court will be prejudiced in their ability to obtain a fair and impartial hearing." (Appellant's Jurisdictional Statement, p. 39) (Emphasis ours)

Assuming arguendo that this is a true description of appellee Russell's courtroom, appellant has not produced a scintilla of evidence to show that this situation stems from the fact that appellee Russell is not an attorney or that there is a reasonable likelihood of the situation arising whenever there is use of a lay judge in a trial.

According to appellant's own telephone survey, there are forty-one police judges who are attorneys (Appellant's Jurisdictional Statement, Appendix 6). Yet appellant has failed to produce any proof—or even reasonable grounds for speculating—that attorney judges are less biased or less prone to judicial error than lay judges. There has been no showing that lay judges give harsher sentences, or that they are reversed more on appeal, or even that they convict more defendants. Appellant's contention that there is a greater likelihood of prejudice or judicial error in courts of lay judges is based upon pure conjecture. Without more substantial facts, appellant's contention remains an hypothesis and nothing more.

The fact that a judicial error may have been committed in a single proceeding does not necessarily mean there has been a denial of due process in all courts of the

same classification. The Fourteenth Amendment does not assure immunity from judicial error. *Breck* v. *Washington,* 369 U.S. 541 (1962). If, in an individual case, a defendant does feel that the judge, be he an attorney or non-attorney, is biased or that he [defendant] has been denied his right to fundamental fairness, he has a remedy under Kentucky law.

Under Kentucky's two-tier misdemeanor court system an accused may challenge the decision of a police court by an appeal of right to the circuit court for a trial *de novo.* In circuit court the judge is required to be an attorney with a minimum of eight years experience in practice. KRS 23.032(1); Kentucky Constitution § 130. Since this circuit court trial is a trial *de novo,* Kentucky Rule of Criminal Procedure 12.06, the defendant is actually given an advantage by the presence of the police court system. If the defendant is acquitted in the police court, no more action can be taken against him; but if he is convicted, he has the right to a completely new trial in circuit court. As this Court pointed out in *Colten* v. *Kentucky,* 407 U.S. 113 (1972):

> "... The right to a new trial is absolute. A defendant need not allege error in the inferior court proceeding. If he seeks a new trial, the Kentucky statutory scheme contemplates that the slate be wiped clean. Ky. Rule Crim. Proc. 12.06. Prosecution and defense begin anew. By the same token neither the judge nor jury that determines guilt or fixes a penalty in the trial de novo is in any way bound by the inferior court's findings or judgment. The case is to be regarded exactly as if it had been brought there in the first instance."

Further in *Colten,* this Court stated:

> "... In reality his [defendant's] choices are to accept the decision of the judge and the sentence imposed in the inferior court or to reject what in effect is no more than an offer in settlement of his case and seek the judgment of judge or jury in the superior court, with sentence to be determined by the full record made in that court." 407 U.S. at 119

The police court has been created in Kentucky to provide a more efficient and less expensive adjudication of misdemeanors. The police court serves not only to ease the burden on circuit courts and prevent backlogs on their dockets, but also to afford a defendant a speedy hearing. Appellees submit that under Kentucky law a defendant's right to due process is adequately preserved regardless of whether the judge of the police court is an attorney.

In view of the fact that appellant has failed to demonstrate an identifiable probability of bias or a reasonable likelihood of denial of due process in trials presided over by law judges, it is well to consider this Court's ruling in *Snyder* v. *Commonwealth of Massachusetts,* 291 U.S. 97, 105 (1933):

> "The Commonwealth of Massachusetts is free to regulate the procedures of its court in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental [citations omitted].

> Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar."

Even if this Court is persuaded that attorney judges are to be preferred over non-attorney judges, it should not strike down the entire inferior court system of Kentucky unless it is firmly convinced that the system is in actual violation of the Constitution, for as this Court stated in *Shadwick,* supra, ". . . Our federal system warns of converting desirable practice into constitutional commandment." 407 U.S. at 352.

The admirable restraint which the Kentucky Court of Appeals has shown in this respect may prove instructive. On remand from this Court the Kentucky Court stated:

> "We fully appreciate the absurdity of having a lawsuit — any lawsuit — presided over in this day and age by a person without legal training or experience. Nevertheless, it was our conclusion in *Ditty* v. *Hampton,* Ky., 490 S.W.2d 772 (1973), that the federal constitution does not deny the people the right to have it that way if they so desire." (Appellant's Appendix, p. 4a)

Appellees therefore submit that the mere fact that appellant was tried by a lay judge does not raise a substantial federal question, inasmuch as it cannot be demonstrated that such trials inherently result in the denial of "fundamental fairness shocking to the universal sense of justice." *Kinsella* v. *United States, ex rel Singleton,* 316 U.S. 234 (1960).

B. APPELLANT PRESENTS NO SUBSTANTIAL FEDERAL QUESTION UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE HE HAS FAILED TO DEMONSTRATE THAT VARIANCE OF THE QUALIFICATIONS JUDGES ARE REQUIRED TO MEET DEPENDING UPON LEGISLATIVE CLASSIFICATION OF JUDICIAL DISTRICTS ON THE BASIS OF POPULATION IS UNREASONABLE OR IRRATIONAL.

Since appellant has failed to demonstrate that there is a "fundamental right" to have misdemeanor charges tried before a judge who is an attorney, when, as is the case herein, the Legislature requires judges to be attorneys in some classes of judicial districts but not in others, the validity of the classification under the Equal Protection Clause of the Fourteenth Amendment turns not upon the question of whether it serves "a compelling state interest," but rather upon the question of whether one who attacks the classification can demonstrate that it bears no reasonable or rational relationship to a legitimate state interest. *Shapiro* v. *Thompson,* 394 U.S. 618 (1969).

The Kentucky General Assembly in the exercise of its legislative discretion has varied the qualifications required for police court judges depending upon the population of the judge's respective jurisdiction. Section 156 of the Kentucky Constitution requires cities to be classified according to population size and sets the population limitation for each class of city (Appendix "B"). The Kentucky Legislature has required judges in police courts of first and second class cities, i.e., the most heavily populated cities, to be attorneys, KRS 26.140, 26.150; while police judges of cities of the third through sixth classes need not

be attorneys, KRS 26.170, 26.190, 26.200 (Appendix "A" and Appellant's Jurisdictional Statement, pp. 6-7). Appellant claims that this variance of the qualifications judges are required to meet based upon the classification of the cities in which the judges serve unreasonably discriminates against defendants tried in the third through sixth classes of cities in violation of the Equal Protection Clause of the Fourteenth Amendment.

There is a presumption which favors legislative classifications which cannot be overturned unless such classification is plainly arbitrary or without a sound basis in reason.

> ". . . State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *State of Maryland,* 366 U.S. 420, 426 (1961)

Appellees maintain that the statutory classification set forth by the General Assembly of Kentucky is a reasonable method for achieving the Commonwealth's legitimate objective of providing a fair, efficient and expeditious court system for all its citizens. The Kentucky Court of Appeals in *Ditty* v. *Hampton,* supra, presented sound reasons which competently justify the classifications of KRS 26.140, 26.150, 26.170, 26.190 and 26.200:

> "We can conceive of the following possible reasonable bases for the classification here in question:
>
> "1. The greater volume of court business in the larger cities requires that judges be attorneys to enable the courts to operate efficiently and expeditiously (not necessarily with more fairness and impartiality).
>
> "2. Lawyers with whom to staff the courts are more available in the larger cities.*
>
> "3. The larger cities have greater financial resources with which to provide better qualified personnel and better facilities for the courts. *Cf. Metcalfe* v. *Howard,* 304 Ky. 498, 201 S.W.2d 197.
>
> "That population and area factors may justify classifications within a court system has long been recognized. See *Missouri* v. *Lewis,* 101 U.S. 22, 25 L.Ed. 989. Our court has held valid the statutes making different provisions, among the police courts of different classes of cities, as to the right to a jury trial. See KRS 26.400; *Houk* v. *Starck,* 251 Ky. 276, 64 S.W.2d 565; *City of Mt. Sterling* v. *Holly,* 108 Ky. 621, 57 S.W. 491; see also KRS 25.014." 490 S.W.2d at 776-777

Appellees submit that a statutory classification of cities cannot be ruled in violation of the Equal Protection

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***With regard to this point made by the Kentucky Court of Appeals in Ditty, supra, appellees have found that according to the Kentucky-Tennessee Legal Directory of 1974, published by Legal Directories Publishing Co., Inc. and certified by the American Bar Association as having complied with the Rules and Standards for Law Lists, there are twenty-four counties in Kentucky with five or less attorneys and eight counties with two or less atorneys (see Appendix "B").**

Clause unless it is plainly arbitrary and irrational. Appellees assert that the decision of the Court of Appeals of Kentucky in *Ditty* v. *Hampton*, supra, ought to be followed by this Court in that:

> "The reasonableness of the bases for the classification in issue must be measured in the light of the possible detriment that members of the public may suffer from the classification. There has been no showing in this case that nonlawyer police judges, proportionately, convict more defendants, impose higher sentences, or are reversed more on appeal, than lawyer judges. There is no basis for any finding that they are less fair and impartial in cases in which the defendant, as he is entitled, is represented by counsel, or that their ignorance of the law harms the accused more than the government. There is no support for the assertion that the nonlawyer judge, generally, will accept the prosecutor's version of the law rather than that of defense counsel.
>
> "We conclude that the bases for the classification reasonably justify the classification in the balance of the bases against possible detriment factors." 490 S.W.2d at 777

The classification of cities in the instant case is rational and reasonable and does not deny citizens of any city the right to equal protection of the laws; therefore, appellant presents no substantial federal question under the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

Wherefore, appellees respectfully submit that the questions upon which this cause depends are so unsubstantial as not to need any further argument, and appellees respectfully move the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Court of Appeals of Kentucky.

Respectfully submitted,

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I, KENNETH A. HOWE, JR., one of counsel for appellees, hereby certify that the foregoing Motion to Dismiss or Affirm was served on appellant by depositing three copies each of same in the United States mail, first class postage prepaid, this 28th day of May, 1975, addressed to counsel for appellant, HON. CHARLES E. GOSS, Central Street, Harlan, Kentucky 40831, and HON. DEAN HILL RIVKIN, 630 Maxwelton Court, Lexington, Kentucky 40508, of Counsel.

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APPENDIX

APPENDIX "A"

Kentucky Constitution § 156:

"Six classes; population determines classification; organization and assignment. — The cities and towns of this Commonwealth, for the purposes of their organization and government, shall be divided into six classes. The organization and powers of each class shall be defined and provided for by general laws, so that all municipal corporations of the same class shall possess the same powers and be subject to the same restrictions. To the first class shall belong cities with a population of one hundred thousand or more; to the second class, cities with a population of twenty thousand or more, and less than one hundred thousand; to the third class, cities with a population of eight thousand or more, and less than twenty thousand; to the fourth class, cities and towns with a population of three thousand or more, and less than eight thousand; to the fifth class, cities and towns with a population of one thousand or more, and less than three thousand; to the sixth class, towns with a population of less than one thousand. The general assembly shall assign the cities and towns of the Commonwealth to the classes to which they respectively belong, and change assignments made as the population of said cities and towns may increase or decrease, and in the absence of other satisfactory information as to their population, shall be governed by the last preceding federal census in so doing; but no city or town shall be transferred from one class to another, except

APPENDIX "A" (Continued)

in pursuance of a law previously enacted and providing therefor. The general assembly, by a general law, shall provide how towns may be organized, and enact laws for the government of such towns until the same are assigned to one or the other of the classes above named; but such assignment shall be made at the first session of the general assembly after the organization of said town or city."

Kentucky Revised Statute 26.400(4):

"In cities of the fourth, fifth and sixth classes, the accused may demand a jury trial in all cases in the police court where the fine may be more than twenty dollars."

Kentucky Revised Statute 26.170 provides in relevant part as follows:

". . . No person shall be eligible to be a police judge [of a third class city] unless, at the time of his election, he is at least twenty-four years of age, is a qualified voter in the city, and has been an actual resident of the city for at least two years next preceeding his election."

Kentucky Revised Statute 26.190 provides in relevant part as follows:

". . . No person shall be eligible to be a police judge [of a fourth class city] unless he is at least twenty-four years of age and has resided within the limits of the city at least six months next preceeding his election."

APPENDIX "A" (Continued)

Kentucky Revised Statute 81.010 provides in relevant part as follows:

Cities are classified as follows:

* * *

"(5) Fifth class:

* * *

"Lynch, Harlan County. . ."

Kentucky Rule of Criminal Procedure 12.06:

"Appeals taken to the circuit court shall be docketed by the clerk thereof as a regular criminal prosecution and shall be tried anew, as if no judgment had been rendered, and the judgment shall be considered as affirmed to the extent of the punishment, if any, adjudged against the defendant in the circuit court, and thereupon he shall be adjudged to pay the costs of the appeal. If an appeal taken to the circuit court be dismissed, the judgment of the court from which it was taken shall stand affirmed and the costs of the appeal shall be paid by the party whose appeal is dismissed."

APPENDIX "B"

KENTUCKY and TENNESSEE LEGAL DIRECTORY, 1974, published by Legal Directories Publishing Company, Inc. (contents corrected to July, 1974; certified by Standing Committee on Law Lists of the American Bar Association, August 2, 1974)

Kentucky Counties
with
Five or Less Attorneys

County	*Number of Attorneys*
Ballard	5
Bath	4
Bracken	2
Carlisle	2
Clinton	4
Crittenden	4
Cumberland	3
Edmonson	3
Elliott	2
Gallatin	4
Hancock	4
Hickman	3

APPENDIX "B" (Continued)

County	*Number of Attorneys*
Jackson	2
Lee	5
Lyon	4
McLean	3
Menifee	1
Owsley	2
Pendleton	4
Robertson	2
Rockcastle	5
Spencer	4
Trimble	2
Wolfe	3

Supreme Court, U. S.
FILED
SEP 5 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1409

LONNIE NORTH,

Appellant,

vs.

C. B. RUSSELL AND NATHANIEL "TRAP" HELTON, JAILER OF HARLAN COUNTY,

Appellees.

On Appeal From The Court Of Appeals Of Kentucky

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Appellees.

On Appeal From The Court Of Appeals Of Kentucky

BRIEF FOR APPELLANT

May It Please The Court:

(a)
OPINIONS BELOW

The first opinion of the Court of Appeals of Kentucky in this case, rendered August 12, 1974, is reported at 516 S.W. 2d 103, and is printed in the Appendix at Page 62. The second opinion of the Court of Kentucky on remand from this Court, rendered March 21, 1975, is unreported. A copy of the opinion appears in the Appendix at Page 63.

(b)
JURISDICTION

(i) Nature Of The Proceedings

This suit was filed by Appellant, North, in Harlan County, Kentucky Circuit Court seeking, by writ of *habeas corpus*, to secure his release from confinement in the Harlan County Jail under a sentence of 30 days imprisonment imposed by appellee, Russell, Lynch City Police Judge. North was convicted in the Lynch City Police Court of the crime of driving while intoxicated, fined $150.00, and imprisoned for a term of 30 days in the Harlan County Jail. North's driving privileges were also revoked. In the trial court, North maintained that his rights to due process and equal protection of the laws accorded to him as a citizen of the United States of America by the Fourteenth Amendment of the United States Constitution were abridged,[1] in that he was accused, tried and convicted in a court presided over by a judge, destitute of legal competency and capacity, but who derived his authority under certain Kentucky Statutes.

(1) Trial Court Proceedings

After issuing its writ of *habeas corpus* and enlarging the appellant on bail, the Harlan Circuit Court held a full evidentiary hearing on July 23, 1974, Appendix, pages 11-56. Following the hearing, it reluctantly dissolved the writ of *habeas corpus* under the precedent of

[1] The petition for writ of habeas corpus, raising the issues presented in this appeal in the Harlan Circuit Court, is printed in Appendix, pages 4-10.

Ditty v. Hampton, 490 S.W.2d 772 (Ky. 1972),[2] *dismissed as moot*, 414 U.S. 885 (1973), and ordered North remanded to the custody of the Harlan County Jailer, permitting him to continue on bail provided he file a notice of appeal to the Court of Appeals of Kentucky.[3] On July 23, 1974 appellant filed his designation of the entire record, together with his notice of appeal to the Court of Appeals of Kentucky. On August 5, 1974, he filed his motion for appeal and other necessary papers.

(2) Initial State Appellate Court Proceedings

On August 12, 1974, the Court of Appeals of Kentucky, the Court of last resort in Kentucky, affirmed *per curiam* the judgment of the Harlan Circuit Court, granting the motion for appeal, but denying the writ of *habeas corpus*, and setting aside North's bail, *North v. Russell*, 516 S.W. 2d 103 (Ky. 1974).

On August 26, 1974, North filed with the Court of Appeals of Kentucky his notice of appeal that the decision of the Court of Appeals of Kentucky was appealed to the Supreme Court of the United States of America pursuant to 28 *U.S.C. Section* 1257 (2) (1970).

(3) Previous United States Supreme Court Proceedings

That first appeal to this Court was docketed October 16, 1974 as number 74-437. On that appeal this Court

[2] The trial court dissolved the writ with reluctance and only after slapping the system that "allows persons of insufficient training, knowledge and experience to preside at criminal trials which, inherently, require a great deal of training, knowledge and experience in order that each citizen be accorded the rights guaranteed to him by the law".

[3] The opinion of the trial court is printed in the Appendix, pages 57-61.

vacated the judgment of the Kentucky Court of Appeals and remanded the case, *North v. Russell*, 516 S.W.2d 103 (Ky. 1974), *Judgment vacated*, 95 S.Ct. 673 (1974), to the Court of Appeals of Kentucky "for further consideration in light of the position presently asserted by the Commonwealth". The remand had been urged by the Attorney General of Kentucky upon his suggestion that North should be released "solely upon the basis of violations of Kentucky Law. . . ."

(4) Judgment On Remand And Notice Of Appeal

On March 21, 1975, the Court of Appeals of Kentucky, *while recognizing the absurdity of the lay judge system*, again affirmed the judgment of the trial court, noting that the Federal Constitutional questions urged throughout this case were the only questions presented on this appeal and that there were no state questions presented upon which North might be freed. See Appendix, Pages 63-66.

The Court of Appeals again refused to order North's release. On March 28, 1975, North again filed a Notice of Appeal that this most recent decision of the Court of Appeals was appealed to the United States Supreme Court pursuant to 28 U.S.C. 1257 (2) (1970), Jurisd. Stat., Appendix, 17a.

(5) Review Granted By The Supreme Court

On June 23, 1975, the United States Supreme Court noted probable jurisdiction in this case.

(ii) Statutes Conferring Jurisdiction

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. 1257 (2) (1970). Certiorari jurisdiction is conferred by 28 U.S.C. 1257 (3) (1970).

(c)

STATUTES AND CONSTITUTIONAL PROVISIONS

The validity of Kentucky Revised Statutes, Sections 26.010, 26.140, 26.150 (1), 26.200 and Kentucky Constitution, Section 130 are involved in this appeal.

Kentucky Revised Statute, Section 26.010 provides:

> "Except as provided in KRS 167.990, 208.020, subsection (4) of 208.990 and 242.990, police courts in *cities of every class* have jurisdiction exclusive of circuit courts in all penal and misdemeanor cases where the punishment is limited to a fine of not more than twenty dollars, jurisdiction concurrent with circuit courts of all penal and misdemeanor cases where the punishment is limited to a fine of not more than five hundred dollars, or imprisonment not exceeding twelve months, or both, and exclusive jurisdiction of all violations of city ordinances occurring within the city limits." (Emphasis added).

Kentucky Revised Statute, Section 26.140 provides:

> "The judge of the police court in cities of the *first class* shall have the qualifications and take the oath required of circuit judges. The judge shall devote his whole attention to the duties of his court. He shall have each year a vacation of two months. Subject to KRS 26.300, the judge may adopt rules and regulations for conducting the business of his court, and may enforce them by process of contempt. He shall have all powers necessary to try cases coming under his jurisdiction. He may administer oaths, and shall be a conservator of the peace. His salary shall be fixed by ordinance, and paid at the same time and in the same manner as the salaries of other city officers." (Emphasis added).

Kentucky Constitution, Section 130 provides:

> "No person shall be eligible as judge of the circuit court who is less than thirty-five years of age when elected, who is not a citizen of Kentucky, and a resident of the district in which he may be a candidate two years next preceding his election, and who has not been a practicing attorney eight years."

Kentucky Revised Statutes, Section 26.150(1) provides:

> "In cities of the *second class* the police court shall have one judge. He shall receive an annual salary of not more than $12,600 to be fixed by ordinance, and no other compensation except the fees allowed to judges for holding examining trials in felony cases. He shall have each year a vacation of one month. No person shall be eligible to be police judge unless at the time of his election he is at least twenty-five years of age and has been a resident of the city for at least four years, and is an attorney-at-law." (Emphasis added).

Kentucky Revised Statutes, Section 26.200 provides:

> "No person shall be eligible to be police judge in a city of the *fifth* or *sixth class* unless he is a resident and voter of the city, and has resided there for a year next preceding his election or appointment. Before entering upon the duties of his office, the judge shall execute a bond to the Commonwealth with good and sufficient sureties, approved by the county judge. The bond shall be filed and recorded in the county clerk's office and an entry made upon the order book of the county court, showing that the bond was executed and approved and giving the names of the sureties. The county judge, at any time that he has reason to believe that the bond is not good or that the sureties are about to become insolvent, shall require that a new bond be executed or additional sureties given on the old one." (Emphasis added).

The Statute under which the appellant is imprisoned is Kentucky Revised Statute, Section 189.520 (2):

> "No person shall operate a motor vehicle anywhere in this state while under the influence of intoxicating beverages or any drug which may impair one's driving ability."

Kentucky Revised Statutes, Section 189.990 (10)(a) (1972), provides:

> "Any person who violates subsection (2) of KRS 189.520 shall be fined, for the first offense, not less than $100.00 nor more than $500.00, and for each subsequent offense he shall be fined not less than $100.00 nor more than $500.00 and imprisoned for not more than six months."

United States Constitution, Amendment XIV, is involved in this appeal:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(d)

STATEMENT OF QUESTIONS PRESENTED

(1) Is Kentucky Revised Statute, Section 26.200, fixing the qualifications of police judges in fifth and sixth class cities, invalid under the due process clause of the Fourteenth Amendment to the Constitution of the United States of America, insofar as that statute subjects the appellant (a criminal defendant accused, convicted and sentenced to a term of imprisonment in a city court in a Kentucky fifth class city) to spurious trial, conviction and imprisonment before a judge: (a) who was untrained in the law and unfamiliar with the substantive and procedural rights guaranteed to the appellant by the Constitution of the United States of America and the laws and Constitution of the Commonwealth of Kentucky; (b) who, because of such lack of training and unfamiliarity, lacked the capacity to afford the appellant a fair and impartial trial; and (c) who actually failed to provide appellant with a fair and impartial trial?

(2) Does the due process clause of the Fourteenth Amendment to the United States Constitution prohibit the spurious trial conviction and imprisonment of the appellant, a defendant accused of misdemeanor conduct in a Kentucky police court, before a tribunal presided over by a judge who: (a) was not cognizant or familiar with the substantive and procedural rights guaranteed to the appellant by the Constitution of the United States and the laws and Constitution of the Commonwealth of Kentucky; who, because of such lack of training and familiarity, lacked the ability, capacity and competency to afford appellant a fair and impartial trial; and, actually failed to provide appellant with a fair and impartial trial; and, (b) was fully reliant on the city prosecutor for legal information and interpretation?

(3) Are Kentucky Revised Statutes, Section 26.010, 26.140, 26.150 (1), and 26.200 invalid under the equal protection clause of the Fourteenth Amendment to the United States Constitution, insofar as those statutes subject the appellant (a criminal defendant convicted and sentenced to a term of confinement in a city court in a fifth class city) to spurious trial, conviction, and imprisonment before a judge: (a) who was untrained in the law and unfamiliar with the substantive and procedural rights guaranteed to the appellant by the Constitution of the United States and the laws and Constitution of the Commonwealth of Kentucky: (b) who, because of such lack of training and unfamiliarity, lacked the competency and capacity to afford appellant a fair and impartial trial; (c) who actually failed to provide appellant with a fair and impartial trial; whereas a criminal defendant accused of identical crimes in courts of identical name, territorial, and criminal jurisdiction in a first and second class city (designated as such solely on the basis of population) is accorded a judge trained and licensed as an attorney?

(e)
STATEMENT OF THE CASE

On July 10, 1974, the appellant, Lonnie North, was arrested in Lynch, Kentucky, and charged with the crime of driving while intoxicated denounced by Kentucky Revised Statutes 189.520 (2), penalty, 189.990 (10)(a), Appendix, Page 35. He was directed to appear for trial on July 18, 1974, at 7:00 P.M. before the Lynch City Police Court. This court is located in a Kentucky city of the fifth class[4] and is presided over by the appellee, C. B. Russell, Appendix, Page 14.

At the appointed time and place, North appeared for trial, and, upon entering a plea of "not guilty" demanded a trial by jury. The occurrences at the appellant's "trial" are substantially agreed upon by all the persons who testified in this action before the Harlan Circuit Court as follows:

(1) North entered a plea of "not guilty", (Appendix, Pages 26, 30, 36, 43, 45, 52).

(2) North demanded a jury trial to which he was entitled, Ky. Const., § 11, KRS § 25.010, (Appendix, Pages 30, 36).

(3) The appellee, C. B. Russell, called the city prosecuting attorney for advice as to whether or not he was required to grant appellant a jury trial, (Appendix, Pages 32, 37, 52).

(4) The appellee, C. B. Russell, advised the appellant that he was not required to grant to him a jury trial and that he would try him himself, (Appendix, Pages 31, 47).

(5) Appellee, C. B. Russell, after hearing only the arresting officer, adjudged the appellant guilty of the crime of driving while intoxicated and im-

[4] Kentucky Revised Statutes § 81.010.

posed a fine of $150.00, sentenced him to 30 days in the county jail,[5] and revoked his driver's license, (Appendix, Page 27).

(6) At his "trial", it is manifest that the Plaintiff received no hearing, (Appendix, Pages 38, 39, 43, 46, 52); that he was not advised of his right to trial by jury, (Appendix, Page 37); he did not have counsel present, nor was he advised of his right to have counsel present, (Appendix, Pages 37, 46); and that he was not advised of his right to confront the witnesses against him and to introduce evidence in his own behalf, (Appendix, Page 37).

(7) The City Police Court of the City of Lynch, Kentucky, is presided over by a "lay judge" who, admittedly, is not cognizant of the various constitutional, statutory, and common-law substantive and procedural rights guaranteed to the appellant as a citizen of Kentucky and as a citizen of the United States of America, and does not possess the necessary knowledge, understanding, training, or experience to enable him to accord to the appellant such various constitutional, statutory, and common-law substantive and procedural rights, (Appendix, Pages 14-25).

(8) The appellee, Russell, was fully dependent upon the city prosecuting attorney for decisions upon legal questions emerging during criminal trials, (Appendix, Page 17).

After having spent the better part of a full day in jail under the conviction, North, on July 19, 1974, filed in the Harlan Circuit Court a petition for writ of *habeas corpus* seeking his release.[6] A writ of *habeas corpus* issued on July 19, 1974, and was directed to appellee, C. B. Russell, the City Judge, and Nathaniel "Trap" Helton,

[5] Even the imprisonment imposed at this spurious "trial" was probably unauthorized since the penalty for the first offense is limited to a fine only and since the charge did not specify multiple offenses. KRS § 189.990(10)(a), (Appendix, page 25).

[6] Appendix, Pages 4-10.

the jailer to whose custody North was committed. On the same day, North was ordered release on bail. Following the hearing held at Harlan, Kentucky on July 23, 1974, the Harlan Circuit Court, after reciting the various constitutional challenges of appellant, dissolved the writ of *habeas corpus*. While expressing doubt about the soundness of the decision of the Court of Appeals of Kentucky in *Ditty v. Hampton, supra*, the court felt bound by that decision and ordered North remanded to custody, enlarging him on bail in the event that he should file a prompt notice of appeal to the Court of Appeals of Kentucky.[7] On the same day, July 23, 1974, he filed his Notice of Appeal and his designation of the entire record.

On August 5, 1974, North filed in the Court of Appeals of Kentucky his Motion for Appeal, together with the appropriate record and other necessary documents.

In the Court of Appeals of Kentucky, the constitutional arguments set forth in the petition for writ of *habeas corpus* and presented in this appeal were duly argued and presumably considered by the Court of Appeals since, on August 12, 1974, the Court of Appeals of Kentucky granted the motion for appeal and affirmed the decision of the Harlan Circuit court in its entirety, citing *Ditty v. Hampton, supra*, although it did set aside appellant's bail, *North v. Russell*, 516 S.W. 2d 103 (Ky. 1974)[8] Appellant was freed on a stay order by Honorable Justice Potter Stewart entered September 10, 1974.

The decision of the Court of Appeals was appealed to the Supreme Court of the United States and was docketed in this Court on October 16, 1974 as number 74-437. In his motion to dismiss or affirm, the Attorney

[7] Appendix, Pages 57-61
[8] Appendix, Page 62.

General suggested that this Court remand the case to the Kentucky Court of Appeals for "that Court's consideration of whether or not appellant should be granted a writ of *habeas corpus* solely upon the basis of violations of Kentucky law . . ." On December 23, 1974, this Court entered the following remand order:

> "Upon the representation of the Attorney General of Kentucky set forth in his motion to dismiss or affirm filed in this Court on November 29, 1974, the judgment is vacated and the case is remanded to the Court of Appeals of Kentucky for further consideration in light of the position presently asserted by the Commonwealth", 95 S. Ct. 673 (1974).

Upon remand to the Court of Appeals of Kentucky, the remand order was argued by briefs filed by both parties. The Attorney General presented to that Court the same contentions advanced in his motion to dismiss or affirm in this Court, that is, that appellant should be released upon the basis of violations of Kentucky law. North argued that such release would put him right back in Judge Russell's court for re-trial. On March 21, 1975, the Court of Appeals of Kentucky, again relying on *Ditty v. Hampton, supra*, rendered its final decision, denying North's release to freedom and holding that no state questions were presented in this appeal, Appendix, Pages 63-66.

On March 28, 1975, North filed his Notice of Appeal that the decision of the Court of Appeals of Kentucky was again appealed to the Supreme Court pursuant to 28 U.S.C. Section 1257 (2) (1970), Jurisd. Stat., Appendix, Page 17a. Probable jurisdiction was noted in this court on June 23, 1975.

In the trial court and in the Kentucky Court of Appeals, North attacked his conviction upon serious constitutional grounds.

(1) He challenged the constitutionality of KRS § 26.200, establishing the qualifications of police court judges in cities of the fifth class, as being repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States of America.

(2) He challenged the constitutionality of the statutory scheme embodied in Kentucky Revised Statutes,[9] Sections 26.010, 26.140, 26.150 (1), 26.200 and Kentucky Constitution, Section 130, as being unconstitutional and repugnant to the equal protection of laws provisions of the Fourteenth Amendment to the United States Constitution, upon the grounds of unequal and discriminatory treatment of him as an accused in a criminal case.

(3) He challenged the constitutionality of his conviction, alleging that the trial judge before whom he was tried, lacked the capacity and competency to accord to him the procedural and substantive rights guaranteed to him by the Constitution of the United States of America and the Constitution and laws of the Commonwealth of Kentucky and, because of such incompetency and because of such incapacity, he was, in fact, denied various of his constitutional rights under such laws.

The challenges set forth in paragraphs (1) and (2) above, since they allege the unconstitutionality of various Kentucky statutes upon specific federal constitutional grounds, are maintained in this appeal as a matter of right, pursuant to 28 U.S.C. 1257 (2). The third ground, specially setting forth a right, privilege or immunity under the Constitution of the United States of America, is maintained pursuant to 28 U.S.C. 1257 (3), under which this court is asked to exercise its discretionary writ of *certiorari*.

[9] Herein designated as "KRS".

In order to place the issues raised in this appeal in an appropriate context, it is necessary to outline the place of the police court in the Kentucky court structure. Candidly termed by the Kentucky Court of Appeals "courts of convenience" not equipped or designed "to conduct error-free trials, or to insure full recognition of constitutional freedoms.", *Colten v. Kentucky*, 467 S.W. 2d 374, 379 (Ky. 1971), *affirmed*, 407 U.S. 104 (1972), these inferior courts found in Kentucky's court system find historical roots in eighteenth century practices and needs. Transplanted from England, the institution of the lay judge, aided by a lack of legally trained persons and the deep-rooted distrust of centralized authority prevalent at the time, acquired considerable political influence in the governing bodies of the newly formed states. See, generally, R. Ireland, *The County Courts in Antebellum Kentucky* (1972). With the growth of the country, the institution retained its power and diverse array of functions, both political and judicial by virtue (a) of the continuing domination of state legislatures by rural interests, where lay judges continued to thrive, and (b) its glorified, but often uncritically accepted, heritage. That the institution survives today, however unsuited to the needs of the day, is a monument to the entrenched political nature of the office.

Description Of Kentucky's Inferior Court System

The Kentucky Revised Statutes create *four separate* inferior or "misdemeanor" courts, each having concurrent jurisdiction over penal and misdemeanor cases where the punishment is limited to a fine of not more than $500.00 or imprisonment for not more than 12 months or both. The county, quarterly and justices courts derive such jurisdiction by virtue of KRS 25.010 and the police courts of the various classes of cities

derive such jurisdiction by virtue of KRS 26.010. In other words, there are four separate inferior courts in Kentucky having simultaneous and concurrent penal and criminal jurisdiction over such misdemeanor cases. The county and quarterly courts are presided over by the same judge, *Kentucky Constitution, Section* 139. The county judge and the justices of the peace holding such jurisdiction are not required to be attorneys, nor to have any educational qualifications whatever, *Kentucky Constitution, Section* 100.

Only in cities of the first and second class is the police judge required to be an attorney, KRS 26.140, 26.150, 26.170, 26.190, and 26.200. The police court judges in other classes of cities need have no education whatever.

Under the above scheme there are hundreds of judges throughout Kentucky's 120 counties in the various county, quarterly, justice and city police courts empowered to preside in misdemeanor cases, wherein the maximum imprisonment which may be imposed is one year in the county jail and a fine of $500.00, Jurisd. Stat., Appendix, Page 35a, and the only ones of those inferior court judges who are required to be attorneys are those city police judges situated in first and second class cities in the Commonwealth of Kentucky of which there are only eight, KRS 81.010. A defendant convicted in Kentucky in any of the above courts has an unconditional right to a *de novo* appeal to the circuit court where the judge is, by law, mandated to be a lawyer, *Kentucky Constitution, Section* 130. For a more complete description of the Kentucky two-tier system, see *Colten v. Kentucky*, 407 U.S. 104 (1972).

The *qualifications* of a police court judge are statutorily prescribed. The Kentucky legislative scheme, pertinent parts of which are set out above, after conferring jurisdiction upon police courts in all classes of cities

(KRS § 26.010) mandates that accused criminal misdemeanants in first and second class cities, of which there are eight in the State, be accorded a judge who is a lawyer, while defendants in lower class cities may be, and almost invariably are, accorded a judge with no legal training and who, indeed, need have no education whatever. The overall scheme is based solely on a formula classifying cities by population, Kentucky Constitution, Section 156. Differing age and durational residency requirements are set out for police court judges in different classes of cities, *compare* KRS 26.170 with KRS 26.200.

Under Kentucky Law, the rules relating to the conduct of criminal prosecutions are substantially the same in all courts. *Kentucky Rules of Criminal Procedure*, in effect at the time of North's "Trial", *Section* 1.02, provides:

> "These rules of criminal procedure govern the procedure in the Courts of the Commonwealth of Kentucky in *all* criminal proceedings . . ."

Rule 1.04 provides:

> "The rules of criminal procedure are intended to provide for a just determination of *every* criminal proceeding . . ."

Rule 1.06 provides:

> "As used in these rules unless the context requires otherwise a 'magistrate' includes judges of circuit, county, and *police* courts and justices of the peace". (Emphasis added).

As provided in the sections above referred to, these rules apply to *all kinds of courts* mentioned in the rules, including the police court, *and to both felonies and misdemeanors.*

In addition to the rules of criminal procedure, there is now in effect in Kentucky the 1974 *Kentucky Penal Code*

(found in Kentucky Revised Statutes, Chapters 500 to 534) creating scores of crimes and containing provisions relating to both procedural and substantive aspects of criminal prosecutions. Other crimes are created and defined in other scattered parts of the Kentucky Revised Statutes.[10]

Summary Of The Jurisdiction Of Lynch Police Court

The new *Kentucky Penal Code* designates crimes in Kentucky as felonies or misdemeanors. It prescribes imprisonment for all "Class A" misdemeanors for a term not to exceed twelve (12) months, and a term of imprisonment for ninety (90) days for "Class B" misdemeanors. That Penal Code, found in Kentucky Revised Statutes, Chapters 500-534 creates fifty-eight (58) "Class A" misdemeanor crimes (involving imprisonment up to twelve (12) months) and thirty-one (31) "Class B" misdemeanor crimes (involving imprisonment for a term up to ninety (90) days). By virtue of KRS 26.010, the Lynch City Police Court and its presiding judge has jurisdiction concurrent with the Harlan Circuit Court in trials of such Class A and Class B misdemeanors. Of course, there are scores of other crimes listed throughout the Kentucky Statutes over which the Lynch City Police Court may, by virtue of KRS 26.010, exercise its criminal jurisdiction, including prosecution of violations for the crime for which the appellant now stands convicted; violation of local option laws (usually involving the issuance and execution of search warrants); and other similar statutory crimes *not listed* in the new penal code.

[10] See, e.g. 242.230, et seq. relating to prohibition.

Case Jurisdiction

Under the new Kentucky Penal Code (and because of KRS 26.010 conferring jurisdiction upon it) the Lynch Police Court and the appellee, Judge of that court, has jurisdiction to try and impose punishment by imprisonment *in such complex* crimes as *criminal attempt; criminal conspiracy; criminal solicitation; criminal facilitation; assault; menacing; reckless endangerment; terroristic threatening; unlawful imprisonment; criminal coercion; sexual abuse; sodomy; criminal trespass; criminal mischief; theft by extortion; forgery; criminal simulation; deceptive business practice; falsifying business records; defrauding secured creditors; issuing false financial statements; misapplication of entrusted property; commercial bribes; compounding of crime; tampering with public records; resisting arrest; hindering prosecution; perjury and false swearing; tampering with a witness or jury; riot; inciting to riot; unlawful assembly; disorderly conduct; harassment; loitering; gambling; prostitution;* and other various and sundry offenses.[11]

Under other sections of the Kentucky Revised Statutes, other misdemeanors involving imprisonment for a term not exceeding (12) months are defined, including violations of prohibition laws, prescribed by KRS 242.190, et seq., which, more often than not, involve the issuance and execution of search warrants upon a showing of probable cause.

[11] Kentucky Revised Statutes, Chapters 500 to 534.

Issuance Of Warrants Of Arrest And Search Warrants

KRS 26.330(3) authorizes a police court in cities of the various classes, including cities of the fifth class, to issue all processes. Such processes include warrants of arrest and search warrants. Under Kentucky law, search warrants may be issued only upon a showing of "probable cause", *Kentucky Constitution, Section* 10. There has developed in Kentucky a large body of law relating to the sufficiency of a sworn affidavit to show "probable cause" and the sufficiency of the search warrant itself to justify a search. See 17 *Kentucky Digest searches and seizures.*

An example of the power of Judge Russell to issue a search warrant may be found in *Kentucky Revised Statutes* 242.370, relating to prohibition.

Additionally, warrants of arrest must be issued only upon probable cause, *Kentucky Rules of Criminal Procedure,*[12] *Section* 2.04.

Preliminary Proceedings Upon Arrest

Upon arrest, a defendant in Kentucky must be taken before a magistrate without unnecessary delay, *RCr* 3.02, who must proceed with a trial, *RCr* 3.04, or admit the accused to bail. *RCr* 3.06.

In the preliminary proceedings a police judge must inform the defendant of the charge against him; of his right to trial; of his right to have counsel; and of his right against self-incrimination, *RCr* 3.08.

[12] Hereafter cited RCr.

In the administration of bail, the magistrate must determine the amount of bail, *RCr* 4.06, and must qualify the sureties, *RCr* 4.08.

A police judge may coerce the attendance of witnesses, *RCr* 7.04, and may permit discovery and use of discovery materials, *RCr* 7.08 - 7.26. The police judge has certain responsibilities relating to the assignment of counsel to indigents, *RCr* 8.04, and determinations of insanity, *RCr* 8.06. The police judge has responsibility for taking pleas, *RCr* 8.08, and receiving and ruling on various motions, *RCr* 8.16 - 8.26.

Trial

The police judge, upon trial of the case, is required to "order the sheriff or the attending officer to summon as many qualified jurors as are necessary to compose the jury . . .", *RCr* 9.30. He must be prepared to rule upon challenges to the panel based upon irregularities in empaneling the jury, *RCr* 9.34, and rule upon challenges to individual jurors based upon legal bias, *RCr* 9.36. He must be prepared to conduct or permit the examination of prospective jurors, *RCr* 9.38, and to grant preemptory challenges to the parties, *RCr* 9.40. The police court judge must be prepared to swear the jury to try the case and to conduct the trial in accordance with a preordained procedure, *RCr* 9.42.

It is appellant's contention that, because Judge Russell did not have the competency and capacity to accord him a fair, impartial and orderly trial, his right to due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States of America was abridged and that his sentence of imprisonment is, consequently, void.

(f)
SUMMARY OF ARGUMENTS

I. The justice of the peace system in America is under broad attack. The President's Commission on Law Enforcement and Administration of Justice describes the criminal court as the central institution in the criminal justice system. It recommends updating of state misdemeanor courts and the provision of criminal courts staffed by judges who are trained in the law. The recommendation of the Commission echoes a similar call by Dean Roscoe Pound made seventy years ago and by many other scholars, committee studies and organizations, including the American Bar Association. The need for competent judges is so imperative and progress so slow that the struggle has moved from state legislatures into the courts. There has occurred during the past fifteen years a criminal law "explosion" and the sweep of new law and court decisions affecting criminal trials is kaleidoscopic.

II. The trial of Lonnie North by a lay judge, destitute of legal knowledge or understanding of the substantive and procedural law essential to a fair trial, abridges North's right to due process of law as extended by the Fourteenth Amendment to the United States Constitution. Law by nature is technical and complex and the stakes involved are too high to risk trial before an untrained judge. This Court has on many occasions described the overwhelming difficulties that a layman faces when confronted with the complexities of law involved in a criminal proceeding. Absent a competent judge, the entire foundation of the adversary system is impaired and criminal trials become a mockery. With the implementation of *Argersinger, Infra*, complete in most states, the time is ripe for this Court to insure that

such lawyers will be practicing in courts presided over by judges capable of affording fair trials to all criminal defendants. The facts of this case conclusively show that appellee, Judge Russell, was utterly incapable of affording a fair trial to Lonnie North or to any criminal defendant and that trial in his court is a legal mockery. Lonnie North found himself incarcerated in the Harlan County Jail under sentence of thirty days under processes which can only be characterized as "shocking". His appeals to Kentucky courts were shunned even though the Court of Appeals of Kentucky recognized the "absurdity" of any system of law which requires trial before an untrained judge. The probability of unfairness pervades Judge Russell's courtroom, and, consistent with the Constitution, he should not be permitted to preside in any criminal case because of the probability that all criminal defendants facing trial in his court will be prejudiced. This court has in various types of cases, established a rule of *per se* unconstitutionality where the probability of prejudice infecting a trial is apparent. Such a rule of *per se* unconstitutionality should extend to all criminal trials presided over by untrained judges, where imprisonment is imposed.

III. The Kentucky Police Court scheme, providing licensed attorneys as judges in the police courts in first and second class cities, but judges with no qualifications in the same courts in other classes of cities, abridges North's right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution. The classification, based on population, is arbitrary and cannot be justified as necessary to the achievement of a compelling state interest. Nor can it be said that the classification rests upon some ground of difference, having a fair and substantial relation to the object of the legislation.

(g)

THE ARGUMENT

"Somewhere in the United States, in some small city or rural county seat, there must exist a courthouse where trials are held on time for everybody who wants one, where judges and lawyers perform their tasks ably, and where the public is treated courteously and justly." Downie, Justice Denied, Praeger Pub., Page 7.

I.

THE INHERENT UNFAIRNESS OF TRIAL BEFORE A JUDGE, UNINFORMED ON THE LAW RELATING TO THE CONDUCT OF CRIMINAL PROCEEDINGS, IS WELL-RECOGNIZED BOTH WITHIN AND WITHOUT THE PROFESSION AND HAS BEEN IMPLICITLY RECOGNIZED BY THIS COURT IN *SHADWICK v. CITY OF TAMPA, INFRA*.

(A) The Tradition of Criminal Trials Presided Over By Untrained Judges Is Under Broad Attack.

The President's Commission on Law Enforcement and Administration of Justice,[13] described the criminal court as follows:

> "The criminal court is the central, crucial institution in the criminal justice system . . . It is the institution around which the rest of the system has developed and to which the rest of the system is in large measure responsible . . ."

It is described in that Report as the institution which "is expected to articulate the community's most deeply held, most cherished views about the relationship of the individual and society".

This independent study profiles the complexities of the criminal law and the importance and magnitude of the

[13] The Challenge of Crime in a Free Society, United States Government Printing Office, February, 1967, Chapter 5, Page 125.

services rendered by criminal courts both to the individual and to society. The Report must be viewed as a sweeping indictment of the administration of criminal justice in the lower courts throughout most of the United States.

Noting the differential treatment accorded to defendants accused of only minor offenses, the Report states, *Page* 129:

> "A system that treats defendants who are charged with minor offenses with less dignity and consideration than it treats those who are charged with serious crimes is hard to justify . . . all criminal cases should be tried by judges of equal status under generally comparable procedures."

The Report, in dealing with justice of the peace courts in rural communities, notes that such courts continue to exercise some criminal jurisdiction in at least thirty-eight states, and that:

> "In more than thirty States justices of the peace are not required to be lawyers and the incompetence with which many perform their judicial functions has long been reported."[14]

Noticing the trend of many States toward reformation of justices courts, the Report recommends that justices of the peace courts be abolished and their functions transferred to district or circuit courts who have full-time professional standing, or that such courts be placed under a unified court system. Important to this case is the recommendation, *Page* 130:

> "All justices should be required to be *fully trained in the law* and in their duties and their level of com-

[14] It is important to the expanding concept of due process to note that twenty states have seen fit to require legal training, Wolf v. Colorado, 338 U.S. 25 (1949).

petence should be maintained by continuing training." (Emphasis added).

The recommendation of the President's Commission is an echo of the clarion call of Dean Roscoe Pound, made almost seventy years ago in his famous address to the American Bar Association at St. Paul on *"The Causes of Popular Dissatisfaction with the Administration of Justice,"* 29 *A.B.A. Rep.* 395 (1906), 40 *Am. L. Rev.* 729 (1906), calling for the unification of trial courts and defining, as one of the essentials of the sound administration of criminal justice, the provision of competent judges trained in the law.

In the intervening years between Dean Pound's prophetic call and the Report of the President's Commission, many scholars, commission studies, and organizations issued urgent calls for lower court reform[15] which calls have gone largely unheeded.

More recently, the house of Delegates of the American Bar Association in February, 1974, adopted the report of the American Bar Association's Project on Standards for Court Organization entitled, *"Court Organization"*. On *Page* 39, the Report observed that.

> "The quality of a court system is determined chiefly by the quality of its judges".

At *Section* 1.21(a), *Page* 40, it is recommended:

> "(a) Personal and professional qualifications. All persons selected as judges should be of good moral character, emotionally stable and mature, in good physical health, patient, courteous, and capable of deliberation and decisiveness when required to act on their own reasoned judgment. *They should have a*

[15] See Bibliography following conclusion, *infra*, for various references relating to lay Judges.

> *broad general and legal education and should have been admitted to the bar.* They should have had substantial experience in the practice, administration, or teaching of law for a term of years commensurate with the judicial office to which they are appointed. (Emphasis added).

The qualifications of Judge Russell (*Appendix, Pages* 14 *to* 24) fall somewhat short of these standards.

In recent years, the struggle to secure more competent judges has moved from the halls of state legislatures into the Courts. See, *e.g., Ditty v. Hampton*, 490 S.W. 2d 772 (Ky. 1972); *Gordon v. Justice Court*, 12 Cal. 3d 323, 525 P 2d 72 (1974); *City of Decatur v. Kushmer*, 43 Ill. 2d 334, 253 N.E. 2d 425 (1969); *State ex rel: Swan v. Freshour*, 219 Tenn. 482, 410 S.W. 2d 885 (1967); In re *Daly*, 294 *Minn.* 351, 200 N.W. 2d 913 (1972).

In short, most would agree that the lower courts, being those courts in which most accused persons find themselves, are central and crucial institutions in any criminal justice system, and that they are in serious need of reform. And most would agree that the provision of a competent judge is central to the need.

(B) The Criminal Law "Explosion" Has Made Essential The Provision Of Well-Informed Judges.

It is no exaggeration to say that, in recent years, a major portion of the business of the United States Supreme Court has involved problems relating to the administration of criminal law. Under the Bill of Rights and the Fourteenth Amendment to the United States Constitution, this Court during the last fifteen years has rendered hundreds of decisions defining public and individual rights in state criminal cases. Those decisions, it is submitted, are relevant not merely for the purpose of formulating propositions for debate in the halls of Harvard and other law schools, but are intended for use

in the administration of criminal justice in every criminal trial to which they are applicable. The broad sweep of those decisions is kaleidoscopic and tests the competency of even the best lawyer. Dealing with the *rights of indigents* (in respect of transcripts, right to counsel, payment of fines); *the rights and standards for trial by jury; confrontation of witnesses; double jeopardy; speedy trial; discovery and access to evidence; burdens of proof and presumptions; effect and acceptance of pleas; competency and commitment proceedings; self-incrimination and suppression of evidence; sufficiency of charges; sentencing; appeals; contempts; juvenile hearings; arrest; searches and seizures; confessions; eye witness identification; Fifth Amendment privileges, and other similar matters*, this Court has defined rights accruing to a defendant in a criminal case under the Federal Constitution which are, at the same time, of manifest importance and of great complexity. Added to this immense body of law are the various case decisions in state courts, codes of criminal procedure, criminal and penal statutes which must be considered in any given criminal prosecution, examples of which are described in this brief in the Statement of the Case, *supra*, Pages 22 to 24. The development of this body of law has been referred to as an "explosion".[16]

This immense growth in the corpus of the criminal law lends the greatest impetus to the need for trained and competent judges. It reflects the ever-expanding concept of the Fourteenth Amendment due process and, in and of itself, makes necessary the expansion of that concept to include adequate tribunals in which the due process concepts are formally administered. In *Wolf v. Colorado*, 338 U.S. 25 (1949), Mr. Justice Frankfurter wrote:

[16] HARRY JONES, The Courts, The Public and the Law Explosion, Prentice-Hall, Englewood Cliffs, 1965.

> "Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. But basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. 338 U.S. at 27.

Our standards of what is deemed reasonable and right have today advanced to that point where the right to have a judge who is trained in the law is recognized as basic to our free society. And this Court has implicitly recognized the need for the introduction of well-trained and competent personnel into the criminal processes if due process rights are to be generally honored.

The President's Commission, *supra*, criticized the treatment of persons charged with minor offenses with less dignity and consideration than those accused of serious crimes and recommended the same measure of consideration for both. In *Argersinger v. Hamlin*, 407 US 25 (1972), this Court declined to make such a difference in respect of the right to counsel, holding that counsel was required in *every* case in which a term of imprisonment is imposed and irrespective of whether the crime charged was a felony or misdemeanor.

Argersinger holds that the trial of misdemeanor cases is often so complex and the specter of mischief so real that due process requires the assistance of counsel in all such cases involving imprisonment. Unless the accused's right to counsel is complemented by a competent judge, familiar with the legal processes relating to criminal trials, the lawyers mandated by *Argersinger* might just as well advance their arguments to an empty room and save their eloquence for a higher court.

In *Gordon v. Justice Court, supra*, the California court mandated lawyer judges in all cases upon the assumption that the due process requirement of counsel in a misdemeanor case similarly required the provision of lawyer judges in order that the argument of counsel, so provided, might have an intelligent forum.

The Court of Appeals of Kentucky in its most recent decision in this case, (*Appendix* 66), seems to attribute some constitutional cure in the provision of North's right to trial *de novo* in circuit court, citing *Colten v. Kentucky*, 407 U.S. 104, 112 (1972). We had thought this Court's decision in *Ward v. Monroeville*, 409 U.S. 57 (1972) made it clear that an accused may not be required to make his way through a legal thicket of thorns in order to avail himself of his fundamental right to fair and impartial tribunal, and that every defendant has the right to a fair trial in the *first instance*! The provision of trial *de novo* increases rather than mitigates the mischief and confesses its reality by appending an unconstitutional trial onto what should be a wholly constitutional process.

(C) Shadwick v. City of Tampa, 407 U.S. 345 (1972) Recognizes The Right Of An Accused To An Informed And Competent Judge.

In that case, this Court laid down a rather exacting standard in connection with the issuance of warrants by lay persons upon the showing of probable cause. In that case, the Court stated, (407 U.S. 345 at 350):

> "Thus an issuing magistrate must meet two tests. He must be neutral and detached and he must be capable of determining whether probable cause exists for the requested arrest or search."

This Court went further and said:

> "If, on the other hand, detachment and capacity do co-join, the magistrate has satisfied the Fourth Amendment's purpose."

Thus, even in connection with so simple a legal judgment as probable cause, this Court has required that the official making the legal determination of probable cause have the capability of making such determination. The holding in the *Shadwick* case is of considerable comfort to appellant, North, because the Court in that case made it very clear that a person exercising judicial functions in criminal cases must have the capacity to make considered legal judgments.

Of course, the appellant in the *Shadwick* case failed to show by any evidence that the clerk who issued the warrant in question was incapable of making a legal judgment as to whether probable cause for issuing the warrant existed. In this case, the transcript of evidence (Appendix 14 to 24) shows very clearly that Judge Russell was empowered to perform judicial functions which he was totally incapable by training, knowledge and experience to perform.

II.

TRIAL OF NORTH BY A LAY JUDGE, DEVOID OF KNOWLEDGE OR UNDERSTANDING OF THE SUBSTANTIVE AND PROCEDURAL LAW ESSENTIAL TO A FAIR TRIAL, VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Lonnie North is a citizen of the United States of America. On the night of July 18, 1974, and on into the afternoon of the following day, he found himself locked in the Harlan County Jail, one of the jails in the State of Kentucky which was recently studied by the Commonwealth of Kentucky and whose facilities were

characterized as "very poor".[17] He was there because he was unfortunate enough to have been accused in the Lynch Police Court before a judge who was destitute of legal training and knowledge. He was under a thirty-day sentence of incarceration growing out of a proceeding which was star-chamber and in which virtually every right that he enjoyed under his citizenship was abridged. Feeling himself entitled to better treatment because of his United States citizenship, he appealed to the Harlan Circuit Court by *Habeas Corpus* to vindicate his right as a citizen to be tried by a judge cognizant of his various rights. The Harlan Circuit Court, acknowledging that the allegations in the Petition for Writ of *Habeas Corpus* were substantially true, reluctantly dissolved the writ as it was required to do under the holding of the Kentucky Court of Appeals in the *Ditty* case, *supra*. North appealed to the highest court of Kentucky, the Court of Appeals, for vindication of his right to a fair and orderly trial presided over by a Judge capable of assuring such a trial, but was again denied under the rule of the *Ditty* case, although the court recognized the "absurdity" of the system. In the state court he alleged and argued the unconstitutionality of *KRS* 26.200, contending that the statute, fixing the qualifications of police court judges in cities of the fifth and sixth classes, is invalid under the due process clause of the Fourteenth Amendment to the Constitution of the United States, for the reason that it subjected him to imprisonment by a judge who has not the competency, capacity, knowledge and understanding of his procedural and substantive rights, so as to accord to the appellant those rights secured to him by the Constitution and laws of Kentucky and by the Constitution of the United States of America, Appendix, Pages 4-10.

[17] Report, Jail Consultant Program, Kentucky Department of Corrections, July, 1975.

The transcript depicting the trial of Lonnie North by Judge Russell is a stark example of the prejudice too often encountered by a criminal defendant when tried by a lay judge. The processes under which he was convicted can only be characterized as "shocking". The probability of an unfair hearing pervades Judge Russell's courtroom and, consistent with the Constitution, he should not be permitted to preside in criminal trials because of the inherent probability that all criminal defendants facing trial in his court will be prejudiced in their ability to obtain a fair and impartial hearing.

To argue that the presence or absence of legal training and knowledge in a judge makes no difference in the quality of justice he dispenses would be patently absurd. To do so is to conclude that legal training and knowledge of the law are irrelevant and unnecessary to the process of legal decision-making and the exercise of judicial functions.

It is the contention of the appellant that this appeal of Lonnie North vs. C.B. Russell, et al, is almost companion with the *Argersinger* case and that due process exigencies inherent in a criminal trial are practically the same in both situations, that is, if the fundamental right to a fair trial is abridged *per se* where imprisonment is imposed without aid of counsel, due process rights are similarly abridged where imprisonment is imposed without the aid of a competent and legally trained trial judge. After much consideration, appellant adopts the position and does urge this Court to acknowledge the probability of due process abridgment in a criminal trial presided over by an untrained judge and avoid the possibility of such abridgment by requiring Kentucky, in the exercise of its criminal powers, to provide a presiding judge who is an attorney, where the accused is ordered imprisoned after a plea of innocence. Such a

holding by this Court would not be novel. It would be consistent with the decision in *Argersinger* and the Court has rendered other similar decisions in other types of cases establishing *per se* rules of unconstitutionality.

For example, this Court invalidated the televising of courtroom proceedings in a criminal trial upon the ground that such procedure is repugnant to the fundamental right to a fair trial as guaranteed by the Fourteenth Amendment, *Estes v. Texas* 381 U.S. 532 (1965). In that case the Court stated:

> "It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the state involves such a probability that prejudice will result that it is deemed inherently lacking in due process", *Id. at* 542-43.

See *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *In re Murchison*, 349 U.S. 133 (1955); *Tumey v. Ohio*, 273 U.S. 510 (1927).

Moreover, this Court has, in some cases, promulgated a rule of unconstitutionality in an endeavor to prevent even the possibility of unfairness in criminal proceedings. See *North Carolina v. Pearce*, 395 U.S. 711 (1969); *Bruton v. United States*, 391 U.S. 123 (1968); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Jackson v. Denno*, 378 U.S. 368 (1964); *Argersinger v. Hamlin*, *supra*.

In terms of probabilities of due process abridgment in a criminal trial presided over by a lay judge, this Court has already spoken on the deficiencies of lay persons to make legal judgments. In *Jackson v. Denno*, 378 U.S. 368 (1964), this Court held that a procedure that leaves the factual determination of the voluntariness of a confession to a jury is invalid in view of the possible inability of a jury to disregard the substance of the confession while at the same time ruling on its admissibility. In *Bruton v. United States*, 391 U.S. 123 (1968), involving the use of a confession of one defendant in a joint trial, the Court stated at Page 135:

> "Nevertheless, as was recognized in *Jackson v. Denno*, supra, there are some contexts in which the risks that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored".

These cases recognize the inability of lay persons to make the nice legal judgments required in a criminal prosecution and the inability of the lay person to segregate the issue of "truthfulness" from the issue of "admissibility" and the issue of "admissibility" from the issue of "guilt".

Again, lack of legal training necessarily involves the danger of over-reliance by the judge on the prosecuting attorney. Anyone familiar with the trial process will recognize that counsel are far more likely to clash than agree on points of law in virtually every juncture of the trial process. Clashes of counsel usually occur in the *voir dire* examinations of prospective jurors on such issues as dismissal of a juror for cause, and continue throughout the trial where the judge is repeatedly called upon to make decisions upon the admissibility of alleged hearsay evidence, opinion evidence, questions of materiality and relevance, impeachment evidence, on probative value of circumstantial or demonstrative evidence, and to weigh the evidence in light of its sufficiency to support a verdict. Finally, there is a direct and causal relationship between Judge Russell's lack of legal knowledge and his necessary reliance on the City Attorney, the prosecutor,

for all legal advice, (*Appendix* 16). *The probability of due process* abridgment by reliance on the prosecutor by an untrained judge is very real. In *Tumey v. Ohio*, 273 U.S. 510 (1927), the Court set a rigid standard in such case where a trial judge may be possibly tempted to overlook the competing claims of the prosecution and the defense:

> "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denied the latter due process of law". Id. at 532.

The foregoing are but examples evidencing the probability of due process abridgment inherent in every trial presided over by an untrained judge.

Accordingly, the Court is urged to adopt in this case a rule of "*per se*" unconstitutionality of trials, involving imprisonment, by a lay judge in a criminal case as violative of the North's Fourteenth Amendment rights to due process of law, based upon the manifest *probability* of due process abridgment, in order that the specter of abridgment of a right so fundamental as a right to a fair trial might be avoided.

In doing so, we urge this Court to apply a rule of inherent prejudice in striking down the practice of trial and imprisonment in criminal courts presided over by lay judges, even though, "one cannot put his finger on its specific mischief and prove with particularity where he was prejudiced", *Estes v. State of Texas*, 381 U.S. 532, 544 (1965). Such a rule would assure to Lonnie North that, upon re-trial of his case, he would be presented with a court presided over by a judge capable by training and experience to accord to him his fundamental right to a fair, impartial and orderly trial and competent "to hold the balance nice, clean and true between

the State and the accused", *Tumey v. Ohio, supra.* If a rule of *per se* unconstitutionality is inappropriate, we then urge the Court to define minimal due process qualifications of judicial competency and capacity, making a judge's competency and capacity to preside in a criminal trial the subject of due process inquiry on a case-by-case basis.

We submit that the concept of a fair trial under the Fourteenth Amendment includes the right of North to be tried by a judge knowledgeable of the relevant law and able to comprehend counsel. Absent such a minimally competent judge, the entire foundation of the adversary system is impaired and justice becomes a mockery, for the procedural and substantive safeguards designed to assure a fair trial are ignored, or at best, ineptly applied. See Traynor, *Rising Standards of Courts and Judges*, 40 Calif. SBJ 677, 690 (1955) ("The finest tools may still botch a job in the hands of an inept carpenter"). If the concept of *ordered* liberty, *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), is to have any meaning, it must include recognition by the expositors of the law of the basic guarantees underlying our system of justice. This recognition and accompanying expertise, "the keystone of the whole venture", *In Re: Gault*, 387 U.S. 1, (1967), is markedly absent in the inferior courts of Kentucky and, according to most commentators, in the lower courts of other states. With the implementation of *Argersinger v. Hamlin*, 407 U.S. 25 (1972), extending the right to counsel in misdemeanor cases, nearly complete in most states, the time is ripe for this Court to insure that the *Argersinger* mandated lawyers will be practicing before judges who are capable of affording a fair trial to all criminal defendants.

A fair and orderly trial in Judge Russell's court, in accordance with prescribed due process standards, is a virtual impossibility. The facts in this case conclusively show that Judge Russell was utterly incapable of affording a fair trial to Lonnie North or, for that matter, to any criminal defendant. Without any legal training, Judge Russell was totally ill-equipped to comprehend the rules of evidence or the applicable rules of criminal procedure. Even if he desired to educate himself in particular cases, his sources of independent information were few. Even more revealing is Judge Russell's candid admission that he is virtually unfamiliar with the Bill of Rights and their interpretation by this Court in criminal cases and only nominally familiar with state criminal law, (Appendix, Pages 18-21). With this meager background, Judge Russell exercised in Lonnie North's case the kind of unfettered discretion antithetical to the concept of ordered liberty implicit in our notion of a fair trial. Without rules and principles as touchstones to decision, due process is simply nonexistent in Judge Russell's courtroom. And any trial conducted by him becomes a legal mockery.

Law, by nature, is technical and complex. Because of the ultimate stakes involved, the criminal law has evolved into a panoply of rules and procedures, often containing subtle distinctions, which must be applied to the unique facts of a particular case with diligence and sensitivity by the presiding judge. Even in so-called minor or petty offenses this Court has recognized that the "legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are (no) less complex than when a person can be sent off for six months or more." *Argersinger v. Hamlin*, 407 U.S. 25, 33 (1972).

Without schooling in the fundamentals of legal analysis and reasoning, an untrained and unversed judge inevitably decides each case on the basis of uninformed discretion, which "however benevolently motivated, is . . . a poor substitute for principle and procedure, *In re Gault*, 387 U.S. 1, 18 (1967). Exercising "common sense", the judge turns the rule of law, integral to the preservation of society, into rule by fiat and whimsy. Dean Roscoe Pound has trenchantly observed how typical lay judges irresistibly make a mockery of justice:

> "With no training in the law, no training in process of judicial thought, and no mental habit of mind acquired by constant experience in legal reasoning, it would indeed be strange if a (lay judge) did not treat each case as a unique proposition. He has no category or class into which he may place it, no analogies from which to draw to solve the new problem before him. He has no legal rules, principles or standards by which to judge the merits of the controversy to be decided. Wholly unlike the judge who is trained in the law, he has no precedents to guide him. In deciding the cause before him the lay judge is necessarily limited by his own personal experience acquired in the short span of a single lifetime. He cannot call on the legal experience of the ages to assist him but is helpless to any more than apply his own personal notions of right or wrong to the case at hand. The justice which such tribunal is capable of dispensing is but the outcropping of the experiences of a personality, often limited and warped by passion and prejudice, and at best, as variable as the personalities of the justices who comprise (the system) . . . Such justice is not justice at all. It is unequal, uncertain and capricious." R. Pound, Outlines of Lectures on Jurisprudence 75 (3d ed. 1963).

Stated most simply, the archaic system challenged in this case cannot comport with the demands of modern-day justice.

On many occasions, this Court has described the overwhelming difficulties any layman faces when confronted with the complexities of the law in the context of a criminal proceeding. In *Johnson v. Zerbst*, 304 U.S. 458 (1938), for example, the Court stated an obvious truth:

> "That which is simple, orderly, and necessary to the lawyer to the untrained layman may appear intricate, complex, mysterious", *Id. at* 462-63.

Perhaps the most persuasive line of cases supporting the concept of a legally knowledgeable tribunal as a necessary component of a fair trial are those cases articulating and extending the right to counsel in criminal cases. Inherent in the holdings of *Powell v. Alabama*, 287 U.S. 45 (1932); *Gideon v. Wainwright*, 372 U.S. 335 (1963); and *Argersinger v. Hamlin*, 407 U.S. 25 (1972) is the inexorable corollary that the defendant's right to counsel and to a fair trial includes, both on Sixth and Fourteenth Amendment grounds, the right to a judge who is mentally equipped to comprehend the arguments of counsel and to conduct a trial in a manner most conducive to the emergence of truth. These cases explicitly recognize the competence only a lawyer can bring to the defense of an accused and the fair application of the law, and emphasize, however implicitly, that counsel and the court must complement each other to insure the proper functioning of our adversary system of justice. See, generally, *D. Peck, The Complement of Court and Counsel* (1954).

III.

THE KENTUCKY POLICE COURT SCHEME IS REPUGNANT TO THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

As the structure of the Kentucky police court system described above reveals, whether an accused stands trial

before a lay judge or an attorney judge depends on his *whereabouts*. If a person is charged with a misdemeanor in Lexington, Kentucky, a second class city, he is accorded a judge required by statute to be a lawyer. If the same person is charged with the same misdemeanor 18 miles away in Paris, Kentucky, a fourth class city, he might be compelled to stand trial before a lay judge. Yet jurisdiction is conferred upon both courts by the same statute, *KRS* 26.010; both courts bear the same name; and both courts have the same territorial and other jurisdiction. The historical antecedents of this scheme, in days when means of transportation and communication were not as sophisticated, perhaps justified a differential treatment. But, in 1974, such a system finds little practical justification. In *Ditty v. Hampton, supra*, cited by the Kentucky Court of Appeals in its decision, the legislative justification was said to be (*Page* 776):

> "1. The greater volume of court business in the larger cities requires that judges be attorneys to enable the courts to operate efficiently and expeditiously (not necessarily with more fairness and impartiality).
> 2. Lawyers with whom to staff the courts are more available in the larger cities.
> 3. The larger cities have greater financial resources with which to provide better qualified personnel and better facilities for the courts. *Cf. Metcalf v. Howard*, 304 Ky. 498, 201. S.W. 2d 1970."

In light of the unequal treatment accorded criminal defendants by the Kentucky police court scheme, Appellant submits that, under standards applied by this Court to test the compatibility of burdensome legislative classifications with the equal protection clause, this arrangement must be invalidated upon the following considerations:

(A) The Kentucky Police Court Scheme Impinges Upon Appellant's Fundamental Right To A Fair Trial And Cannot Be Justified As Necessary To The Achievement Of A Compelling State Interest.

In a variety of cases this Court has applied an exacting standard of precision to statutory classifications affecting *fundamental* constitutional rights of individuals. In these cases, the Court has placed a heavy burden on the state to demonstrate that, (a) such laws are "necessary to promote a compelling state interest", *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969), and (b) that the means chosen by the state in pursuing even very substantial interests are the least restrictive methods of achieving the asserted goals of the legislation, *Id.* at 631. See *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972). By requiring states to carefully tailor discriminatory classifications, the Court has extended constitutional safeguards to *all* citizens within a state, not merely those favored by imprecisely drawn classifications which are often based on outmoded facts and theories having little, if any, justification in modern times. When measured against the demanding standard of *Shapiro*, this Kentucky police court scheme cannot stand.

(1) The Impingement

As a threshold consideration, it is clear that the statutory scheme permitting uninformed judges to try criminal cases impinges upon a defendant's fundamental right to a fair trial, *Gordon v. Justice Court, supra.* As discussed more fully below, the lay judge's ignorance of the basic constitutional protections essential to a fair trial—in this regard, it is important to note that most of the explicit protections of the first ten amendments relate to the trial stage—inherently prejudices and burdens a defendant's right to a fair trial, called in *Estes v. Texas*, 381 U.S. 532, 540 (1965), "the most fundamental of all freedoms" and *In re Murchison*, 349 U.S. 133, 136 (1955), "a basic requirement of due process".[18] By definition, a fair trial can only be had when the rules and limitations governing the trial are recognized and studiously honored. These rules and limitations serve as a necessary precondition to our concept of a fair trial. Without their recognition and knowledgeable interpretation and application by the judge, whose distinct role it is to assure the defendant a fair trial consistent with these established safeguards, a fair trial is an impossibility.[19] This case is one monument to that fact.

A criminal trial, even in a misdemeanor case, involves the writing of a charge; fixing of bail; giving notice of the charge; making appropriate provisions for counsel; summoning a jury; empaneling a jury in accordance with technical legal standards; observing very technical and precise procedural and substantive rules, both codified and uncodified, relating to the order of the hearing, reception of evidence, handling of motions, instructing the jury, and receiving and enforcing a verdict; and the many and varied rules, both procedural and substantive, relating to post-trial proceedings and appeals. Rules relating to this criminal process are found in codes of procedure, statutes, state and federal constitutions, and in a great body of common law related by court decisions. Every state has recognized the technical nature of this process and the extensive learn-

[18] This Court has recognized that the right to a fair trial is guaranteed in trial courts at all levels and that a "State's trial court procedure (cannot) be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication", Ward v. Village of Monroeville, 409 U.S. 57, 61 (1972).

[19] In its most recent decision in this case the Kentucky Court said: "We fully appreciate the absurdity of having a lawsuit—any lawsuit—presided over in this day and age by a person without legal training or experience".

ing required to master it, and has imposed license standards upon any person who would practice the legal arts.

In this context, Lonnie North found himself charged with a crime and facing loss of his liberty. His trial was programed by the State and Federal Constitutions and by the procedural and substantive rules of law of Kentucky to be both fair and orderly. Unfortunately, there is in Kentucky's criminal processes a kind of legal hypocrisy which empties the system of all of these protections by entrusting the trial of his case to a police judge devoid of legal knowledge or understanding. Judge Russell professes much "common sense", (Appendix Page 24), but admits that he knows nothing at all about the various procedural and substantive rights accorded North as a citizen of Kentucky and of the United States. Who can read the transcript in the trial court without concern for the incredible incompetency of Judge Russell, whose judicial authority is sanctioned by the very statutes which we now challenge? And who can but feel sympathy and emphatic indignation at the shameful way in which North was accorded the most fundamental of his civil rights—the right to a fair and orderly trial?

(2) The Justifications

Once it is concluded that a *fundamental* constitutional guarantee is diluted by the operation of the Kentucky statutory scheme, the state must demonstrate that the classifications are necessary to the achievement of a compelling state interest, *Shapiro v. Thompson, supra.* In light of the three reasons offered by the Kentucky Court of Appeals in *Ditty v. Hampton, supra,* as the justification for these provisions, no such showing is made:

First, logic and experience sustains the court's proposition that "the greater volume of court business in the larger cities requires that judges be attorneys to enable the courts to operate efficiently and expeditiously". But, if it is the denial of the right to a fair trial that is in question, this justification is meaningless. It certainly is no reason for depriving one group of citizens of the benefits resulting from such efficiency and expedition. It is well recognized, moreover, that "the Constitution recognizes higher values than speed and efficiency", *Stanley v. Illinois* 405 U.S. 645, 656 (1972).

Second, the justification that "lawyers with whom to staff the courts are more available in the larger cities", while perhaps compelling eighty years ago, cannot stand as even reasonable in 1974, when transportation capabilities and lawyer density patterns reveal that there is more than sufficient legal manpower to staff the courts. (See *Martindale-Hubbell Law Directory,* showing lawyer distribution patterns in Kentucky). Belying this justification is the theoretical provision of counsel, as required by *Argersinger v. Hamlin,* 407 U.S. 25 (1972), to all criminal defendants in even the most remote courtrooms in Kentucky.[20] Moreover, to further its interests, the state has available to it alternative "less drastic means" which recognize the rural-urban disparity in legal manpower but still advance the state's objectives. For example, the state might follow the federal lead in requiring bar membership for inferior court judges—magistrates, in the federal system—unless there is a demonstrable showing that no attorney is available in the particular locale, 28 U.S.C. Section 631 (b) or in permitting an accused to elect to stand trial before an attorney judge in a higher court, 18 U.S.C. Section 3401 (b).

[20] Implementation of Argersinger in lay courts is often more theoretical than real, as any outland lawyer will attest.

Third, the notion that "the larger cities have greater financial resources with which to provide better qualified personnel and better facilities for the courts" is an obviously insubstantial consideration under the strict scrutiny test. See *Shapiro v. Thompson, supra.* If financial resources available in a particular area is to be a justifiable standard of approved fairness in a criminal trial, then we place a price tag on our fundamental freedom—an intolerable concept.

It is clear that the classification cannot be sustained under the "compelling state interest" test, nor, as we will see, can it be sustained under the less restrictive "rational basis" test.

(B) The Kentucky Police Court Scheme Establishes Classifications On The Basis Of Criteria Wholly Unrelated To The Objectives Of The Statutes And Therefore Violates The Equal Protection Clause Of The Fourteenth Amendment.

Under the less restrictive scrutiny standard articulated by this Court on numerous occasions, the Kentucky police court scheme is untenable. In *Reed v. Reed,* 404 U.S. 71 (1971), where a unanimous Court invalidated an Idaho probate provision giving men mandatory preference over women when persons of the same priority class applied for appointment to administer a decedent's estate, Chief Justice Burger articulated the now applicable standard for such differential treatment:

> "In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to the states the power to treat different classes of persons in different ways. The Equal Protection clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of the statute. A

> classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike'."

Under this standard, the constitutionality of the Kentucky scheme depends on whether the *population criteria* (which is the basis of the challenged classifications) substantially advance the legislative purposes of the statutes. North submits that they do not in any rationally justifiable way. The Court of Appeals of Kentucky in *Ditty v. Hampton, supra,* described the three objectives of the classification as being the provision of lawyer judges in metropolitan areas where the volume of court business was greater, where lawyers are more readily available and where greater financial resources may be found. The object of the classification must, on the other hand, be conversely interpreted as an attempt at a justifiable *relaxation of standards* of judicial competence in rural areas, where, because of population, these three objectives may not be met.

First, as we have seen, there is no necessarily consistent or rational correlation between the class city and the number of lawyers practicing therein. Moreover, even the small number of lawyers in many lower class cities are sufficient to handle the small amount of judicial business transacted in those cities.

Second, the differential treatment is attributed by the Court of Appeals to docket considerations, the court inferring from the legislation that, because of the greater case loads in urban areas, lawyer judges are required to promote efficiency and expedition of the case load. This seems a slight basis upon which to excuse a discriminatory practice. If appellant's court experience is any indication Judge Russell's disposition of criminal charges is both efficient and expeditious.

Finally, the court inferred from the legislation that another objective of the Kentucky Legislature was to require lawyer judges in urban counties, where money is available to pay them, but to require no such judges in those smaller towns where the cities presumably could not afford a lawyer judge. To group all lower-population cities in this fiscal category is, on its face, over-inclusive and conjectural.

The objectives, purposes, and reasons for the discrimination conjectured by the Court of Appeals (fiscal consideration, availability of lawyers, and docket demands) are no justification for the differential treatment accorded the differing classes. The differential treatment by class is patently overinclusive and the reasons advanced for such differential treatment will not withstand this Court's requirement of reasonableness.

Accordingly, it is submitted that the statutes creating this invidious discrimination are unconstitutional under the equal protection clause of the Fourteenth Amendment to the United States Constitution and violate appellant's rights as a citizen of the United States.

CONCLUSION

In this appeal we urge the Court to energize the right to counsel defined in the *Argersinger* case by requiring Kentucky, in the exercise of its criminal jurisdiction, to provide Lonnie North with a forum presided over by a judge capable of understanding argument of such counsel, and administering a fair and impartial trial with all that the term implies.

In doing so, we first urge this Court to go the whole way and declare that, in any case in which an accused *is imprisoned* under a plea of innocence, the trial leading to such imprisonment must be conducted by a licensed attorney as presiding judge. This holding would comport with the effect of the decision in *Argersinger* and would give Lonnie North more assurance that his rights as a citizen will be respected upon his re-trial.

In rendering such decision North asks the Court to declare that the due process clause of the Fourteenth Amendment to the United States Constitution requires that no sentence of incarceration of any accused in a criminal case may be imposed under a plea of innocence unless the accused is tried before a tribunal presided over by a licensed attorney, and that *KRS* 26.200, authorizing trial before a "lay" judge is unconstitutional *per se* under the Fourteenth Amendment to the United States Constitution in the context of such imprisonment.

Alternatively, we ask the Court to declare the statutory scheme, establishing qualifications of trial judges in the various classes of Kentucky cities, unconstitutional as violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

We ask that the judgment of conviction be vacated and that this case be remanded to Kentucky with directions that Lonnie North be accorded a trial presided over by a competent and legally-informed Judge.

Respectfully submitted,

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The Justice of the Peace, being of ancient origin, has received some colorful literary attention, much of which deals with its bent for pomposity, ignorance of the law, and venality. Classic are Justices Shallow and Silence in Shakespeare's *Henry IV* and Justice Overdo of Ben Jonson's *Bartholomew Fair*. And Henry Fielding's reference to Justice Thrasher in *Amelia (Volume* 1, *Harper and Brothers Pub.* (1902), pp. 16-17), written in 1751 illustrates that history has not taken too kindly to the justices:

"The higher we proceed among our public officers and magistrates, the less defects of this kind will perhaps be observable. Mr. Thrasher, however, the justice before whom the prisoners above mentioned were now brought, had some few imperfections in his magistratical capacity. I own I have been sometimes inclined to think that this office of a justice of peace requires some knowledge of the law, for this simple reason: because, in every case which comes before him, he is to judge and act according to law. Again, as these laws are contained in a great variety of books, the statutes which relate to the office of a justice of peace making themselves at least two large volumes in folio; and that part of his jurisdiction which is founded on the common law being dispersed in above a hundred volumes, I cannot conceive how this knowledge should be acquired without reading; and yet certain it is, Mr. Thrasher never read one syllable of the matter.

This perhaps was a defect; but this was not all: for where mere ignorance is to decide a point between two litigants, it will always be an even chance whether it decides right or wrong; but sorry am I to say, right was often in a much worse situation than this, and wrong hath often had five hundred to one on his side before that magistrate, who, if he was ignorant of the laws of

England, was yet well versed in the laws of nature. He perfectly well understood that fundamental principle so strongly laid down in the institutes of the learned Rochefoucault, by which the duty of self-love is so strongly enforced, and every man is taught to consider himself as the centre of gravity, and to attract all things thither. To speak the truth plainly, the justice was never indifferent in a cause but when he could get nothing on either side."

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief for Appellant were served upon Honorable Wix Unthank, Commonwealth Attorney, Harlan, Kentucky 40831, Attorney of Record for Appellees, C.B. Russell and Nathaniel "Trap" Helton, and upon Honorable Ed W. Hancock, Attorney General, Commonwealth of Kentucky, Frankfort, Kentucky 40601, by mailing same, postage prepaid, on this 4th day of August, 1975.

Charles E. Goss

Charles E. Goss

Supreme Court, U. S.
FILED
SEP 4 1975
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1409

LONNIE NORTH ..... APPELLANT

VS.

C. B. RUSSELL AND NATHANIEL "TRAP" HELTON, JAILER OF HARLAN COUNTY ..... APPELLEES

ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR APPELLEES

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In The

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LONNIE NORTH ..... **APPELLANT**

VS.

C. B. RUSSELL AND NATHANIEL "TRAP" HELTON, JAILER OF HARLAN COUNTY ..... **APPELLEES**

ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR APPELLEES

MAY IT PLEASE THE COURT:

OPINIONS BELOW

The first opinion of the Court of Appeals of Kentucky in this case, rendered August 12, 1974, is reported at 516 S.W.2d 103, and is printed in the Appendix at Page 62. The second opinion of the Court of Appeals of Kentucky on remand from this Court, rendered March 21, 1975, is unreported. A copy of the opinion appears in the Appendix at Page 63.

JURISDICTION

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. Section 1257 (2) (1970). Certiorari jurisdiction is conferred by 28 U.S.C. 1257 (3) (1970).

QUESTION PRESENTED

Whether the General Assembly of the Commonwealth of Kentucky has lawfully and constitutionally vested in a non-lawyer judge the power of presiding at a criminal misdemeanor trial held in the police court of a city of the fifth class.

A. Whether an individual charged with a criminal misdemeanor, where the possible punishment upon conviction may be imprisonment, is denied due process of law under the Fourteenth Amendment of the Federal Constitution when initially tried before a non-lawyer police court judge under Kentucky's two-tier misdemeanor court system.

B. Whether an individual charged with a criminal misdemeanor in a police court where the possible punishment upon conviction may be imprisonment, is denied equal protection of law under the Fourteenth Amendment of the Federal Constitution where the Kentucky General Assembly has established different statutory requirements in order to become a police court judge, depending upon the Kentucky constitutional class of city, based upon population size, over which the police court has jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The federal constitutional provisions involved are the Sixth, Tenth and Fourteenth Amendments to the United States Constitution.

The state constitutional provisions involved are Sections 99, 100, 130, 139, 140, 142, 143, 156, 160 and 167 of the Kentucky Constitution.

The state statutes involved are Kentucky Revised Statutes 23.032, 26.010, 26.140, 26.150, 26.170, 26.190, 26.200, 81.010, 87.160 and 87.170(1).

STATEMENT OF THE CASE

The appellees accept as being substantially correct the appellant's statement of the case.

SUMMARY OF ARGUMENT

The Federal Constitution does not require a defendant accused of a criminal misdemeanor for which imprisonment may result if convicted, be tried by a lawyer judge. The Tenth Amendment of the Federal Constitution authorizes states to develop their own court system. The Commonwealth of Kentucky, through its constitution and General Assembly, has established a uniform police court system consisting in part of a non-lawyer judges.

The federal constitutional principle of "fundamental fairness" which universally focuses on rights basic to a fair trial for one accused of a wrongful act does not require a criminal misdemeanor case be heard before a lawyer judge. Due Process under the Fourteenth Amendment

of the Federal Constitution requires only that the tribunal hearing a case be neutral and detached. See especially *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972). This Court has expressly recognized a non-lawyer's ability to think like a judge, determine difficult legal questions and to take action which directly affects an individual's liberty. *Shadwick* v. *City of Tampa*, 407 U.S. 345 (1972). The competency of a particular judge must be determined on a case by case basis, whether the judge is a lawyer or non-lawyer.

Under Kentucky's two-tier misdemeanor court system, an accused may challenge the decision of a police court whether the judge was a lawyer or non-lawyer by a consideration of right to the circuit court where the judge is required to be a lawyer. This right to a trial *de novo* is unconditional and exists even when a defendant seeks redetermination on questions of law. The two-tier system of courts simply acts as a guarantee for total relief, not possible relief based on the record in the police court, to any defendant who feels he has been denied in practice a fair trial in any police court in Kentucky, irrespective of whether the judge was a lawyer or non-lawyer.

The Kentucky General Assembly in the exercise of its legislative discretion has varied the qualifications required for police court judges, depending upon the population of the court's jurisdiction. The variance in the qualifications police court judges are required to meet, based upon the population size of the cities in which the judges serve, presents no discrimination against defendants tried before non-lawyer judges in violation of the Equal Protection Clause of the Fourteenth Amendment. The right to equal protection applies to the manner in which the law is applied to persons rather than geographical areas.

The statutory requirements for police court judges within the classification of cities set forth by the Kentucky General Assembly is a reasonable method for achieving the Commonwealth's legitimate objective of providing a fair, efficient and expeditious police court system for all its citizens. Sound reasons which adequately justify the differing requirements for police court judges in the six classes of cities in Kentucky are (a) the greater volume of court business in larger cities requires that judges be attorneys to enable the courts to operate efficiently and expeditiously, (b) lawyers with whom to staff the courts are more available in the larger cities, and (c) the larger cities have greater financial resources with which to provide better qualified personnel and better facilities for the courts.

ARGUMENT

THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF KENTUCKY HAS LAWFULLY AND CONSTITUTIONALLY VESTED IN A NON-LAWYER JUDGE THE POWER OF PRESIDING AT A CRIMINAL MISDEMEANOR TRIAL HELD IN THE POLICE COURT OF A CITY OF THE FIFTH CLASS.

A. AN INDIVIDUAL CHARGED WITH A CRIMINAL MISDEMEANOR, WHERE THE POSSIBLE PUNISHMENT UPON CONVICTION MAY BE IMPRISONMENT, IS NOT DENIED DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION WHEN INITIALLY TRIED BEFORE A NON-LAWYER POLICE COURT JUDGE UNDER KENTUCKY'S TWO-TIER MISDEMEANOR COURT SYSTEM.

The issue which the appellant raised in the state courts and which he now presents before this Court

is whether the General Assembly of the Commonwealth of Kentucky has lawfully vested in a judge not required to be a lawyer the power of presiding at a criminal misdemeanor trial held in the police court of a city of the fifth class. Appellant's contention is not simply that appellee Judge Russell has denied appellant a fair trial through judicial errors made in the consideration of this particular case, but instead the appellant argues that the inferior court system of Kentucky denies him due process in that a criminal misdemeanor trial presided over by *any* non-lawyer judge is inherently unfair and unconstitutional. Therefore, the appellant has not only the burden of establishing that his federal constitutional rights were violated in this specific instance; he must also demonstrate that such a denial is probable in all criminal cases which are to be heard by judges who are not lawyers. See *Estes* v. *State of Texas*, 381 U.S. 532, reh. den., 382 U.S. 875 (1965); *Re Murchison*, 349 U.S. 133 (1955). The key question, then, before this Court is whether the Federal Constitution *requires* that a defendant accused of a criminal misdemeanor, for which imprisonment may result if convicted, be tried before a lawyer judge.

There can be little doubt that the Tenth Amendment to the Federal Constitution authorizes the Commonwealth of Kentucky and every other state in the Union to develop its own court system. A principal responsibility under the state's police power is to enact "procedures for enforcing its laws." *Salsburg* v. *Maryland*, 346 U.S. 545, 550 (1954). While the Kentucky Constitution does not directly establish police courts, by Section 143 it expressly authorizes the General Assembly of the Commonwealth to do so; and in Sections 160 and 167 it specifies the terms of office

and provides for the election, replacement and removal of police judges.

Section 143 of the Kentucky Constitution states:

> *"Establishment and jurisdiction of.* A police court may be established in each city and town in this state, with jurisdiction in cases of violation of municipal ordinances and by-laws occurring within the corporate limits of the city or town in which it is established, and such criminal jurisdiction within the said limits as justices of the peace have. The said courts may be authorized to act as examining courts, but shall have no civil jurisdiction: Provided, The general assembly may confer civil jurisdiction on police courts in cities and towns of the fourth and fifth classes, and in towns of the sixth class having a population of two hundred and fifty or more, which jurisdiction shall be uniform throughout the state, and not exceed that of justices of the peace."

Sections 160 and 167 of the Kentucky Constitution respectively state as follows:

> "§ 160. *Municipal officers; election and term of office; officers ineligible; 'fiscal officers.'* — The mayor or chief executive, police judges, members of legislative boards or councils of towns and cities shall be elected by the qualified voters thereof: Provided, The mayor or chief executive and police judges of the towns of the fourth, fifth and sixth classes may be appointed or elected as provided by law. The terms of office of mayors or chief executives and police judges shall be four years, and until their successors

shall be qualified; and of members of legislative boards, two years. When any city of the first or second class is divided into wards or districts, members of legislative boards shall be elected at large by the qualified voters of said city, but so selected that an equal proportion thereof shall reside in each of the said wards or districts; but when in any city of the first, second or third class, there are two legislative boards, the less numerous shall be selected from and elected by the voters at large of said city; but other officers of towns or cities shall be elected by the qualified voters therein, or appointed by the local authorities thereof, as the general assembly may, by a general law, provide; but when elected by the voters of a town or city, their terms of office shall be four years, and until their successors shall be qualified.

No mayor or chief executive or fiscal officer of any city of the first or second class, after the expiration of the term of office to which he has been elected under this Constitution, shall be eligible for the succeeding term. 'Fiscal officer' shall not include an auditor or assessor, or any other officer whose chief duty is not the collection or holding of public moneys. The general assembly shall prescribe the qualifications of all officers of towns and cities, the manner in and causes for which they may be removed from office, and how vacancies in such offices may be filled.

* * * *

§ 167. *Terms of officers elected under old charters; when officers to be elected; police judges.* — All city and town officers in this state shall be elected or appointed as provided in the charter of each respective town and city, until the general election in November, eighteen hundred and ninety-three, and until their successors shall be elected and qualified, at which time the terms of all such officers shall expire; and at that election, and thereafter as their terms of office may expire, all officers required to be elected in cities and towns by this Constitution, or by general laws enacted in conformity to its provisions, shall be elected at the general elections in November, but only in the odd years, except members of municipal legislative boards, who may be elected either in the even or odd years, or part in the even and part in the odd years: Provided, That the terms of office of police judges, who were elected for four years at the August election, eighteen hundred and ninety, shall expire August thirty-first, eighteen hundred and ninety-four, and the terms of police judges elected in November, eighteen hundred and ninety-three, shall begin September first, eighteen hundred and ninety-four, and continue until the November election, eighteen hundred and ninety-seven, and until their successors are elected and qualified."

Toward the end provided by the Kentucky Constitution, the General Assembly, in Chapter 26 of the Kentucky Revised Statutes (KRS), has provided for a uniform police court system consisting in part of non-lawyer judges.

KRS 26.010 provides for police courts in cities of

every class and its jurisdictional parameters and states as follows:

> "Except as provided in KRS 167.990, 208.020, subsection (4) of 208.990 and 242.990, police courts in cities of every class have jurisdiction exclusive of circuit courts in all penal and misdemeanor cases where the punishment is limited to a fine of not more than twenty dollars, jurisdiction concurrent with circuit courts of all penal and misdemeanor cases where the punishment is limited to a fine of not more than five hundred dollars, or imprisonment not exceeding twelve months, or both, and exclusive jurisdiction of all violations of city ordinances occurring within the city limits."

Section 156 of the Kentucky Constitution divides all of the Commonwealth's cities into six classes according to population, which section reads:

> "§ 156. *Six classes; population determines classification; organization and assignment.* — The cities and towns of this Commonwealth, for the purposes of their organization and government, shall be divided into six classes. The organization and powers of each class shall be defined and provided for by general laws, so that all municipal corporations of the same class shall possess the same powers and be subject to the same restrictions. To the first class shall belong cities with a population of one hundred thousand or more; to the second class, cities with a population of twenty thousand or more, and less than one hundred thousand; to the third class, cities with a population of eight thousand or more, and less than twenty thousand; to the fourth class, cities and towns with a population of three thousand or more, and less than eight thousand; to the fifth class, cities and towns with a population of one thousand or more, and less than three thousand; to the sixth class, towns with a population of less than one thousand. The general assembly shall assign the cities and towns of the Commonwealth to the classes to which they respectively belong, and change assignments made as the population of said cities and towns may increase or decrease, and in the absence of other satisfactory information as to their population, shall be governed by the last preceding federal census in so doing; but no city or town shall be transferred from one class to another, except in pursuance of a law previously enacted and providing therefor. The general assembly, by a general law, shall provide how towns may be organized, and enact laws for the government of such towns until the same are assigned to one or the other of the classes above named; but such assignment shall be made at the first session of the general assembly after the organization of said town or city."

KRS 81.010 provides in relevant part as follows:
"Cities are classified as follows:

* * *

(5) Fifth class:

* * *

Lynch, Harlan County. . ."

Appellee Russell is the police court judge of this Kentucky city of the fifth class.

The statutory provisions stating the qualifications for the police court judges in the six classes of cities are as follows:

KRS 26.140. Police judge in cities of the first class:

"The judge of the police court in cities of the first class shall have the qualifications and take the oath required of circuit judges. The judge shall devote his whole attention to the duties of his court. He shall have each year a vacation of two months. Subject to KRS 26.300, the judge may adopt rules and regulations for conducting the business of his court, and may enforce them by process of contempt. He shall have all powers necessary to try cases coming under his jurisdiction. He may administer oaths, and shall be a conservator of the peace. His salary shall be fixed by ordinance, and paid at the same time and in the same manner as the salaries of other city officers."

KRS 26.150. Judge of police court in cities of the second class:

"(1) In cities of the second class the police court shall have one (1) judge. He shall receive an annual salary of not more than $21,000 to be fixed by ordinance, and no other compensation except the fees allowed to judges for holding examining trials in felony cases. He shall have each year a vacation of one (1) month. No person shall be eligible to be police judge unless at the time of his election he is at least twenty-five (25) years of age and has been a resident of the

city for at least four (4) years, and is an attorney at law.

(2) The provisions of this section shall not apply to persons who are serving as police judges on June 16, 1972, and who remain in the present position or who are continuously re-elected to the position without any lapse in service."

KRS 26.170. Police judge, third class cities; salary, qualifications:

"The police court in cities of the third class shall have one police judge. The judge shall enter upon the discharge of the duties of his office on the first Monday in January next after his election. He shall receive an annual salary of six thousand dollars unless the city legislative body fix such salary by ordinance in which event the salary shall not be less than two thousand four hundred dollars per annum. The salary will be paid in equal bimonthly installments out of the city treasury, and he shall receive no other compensation except the fees allowed to judges for holding examining trials. He shall have each year a vacation of one month. No person shall be eligible to be police judge unless, at the time of his election, he is at least twenty-four years of age, is a qualified voter in the city, and has been an actual resident of the city for at least two years next preceding his election."

KRS 26.190. Police court and judge in cities of fourth class:

"The police court in cities of the fourth class shall

be held by a single police judge. He shall be elected by the voters of the city at the general election in November, or appointed by the city legislative body, as it may determine by ordinance enacted at least sixty days previous to the next November election. He shall hold his office for a term of four years. He shall take the oath required of circuit judges, and shall be a conservator of the peace. The compensation of the police judge shall be fixed by ordinance before his election or appointment. No person shall be eligible to be police judge unless he is at least twenty-four years of age and has resided within the limits of the city at least six months next preceding his election."

KRS 26.200. Police judge in cities of fifth and sixth classes:

"No person shall be eligible to be police judge in a city of the fifth or sixth class unless he is a resident and voter of the city, and has resided there for a year next preceding his election or appointment. Before entering upon the duties of his office, the judge shall execute a bond to the Commonwealth with good and sufficient sureties, approved by the county judge. The bond shall be filed and recorded in the county clerk's office and an entry made upon the order book of the county court, showing that the bond was executed and approved and giving the names of the sureties. The county judge, at any time that he has reason to believe that the bond is not good or that the sureties are about to become insolvent, shall require that a new bond be executed or additional sureties given on the old one."

Thus, it is clear that each city in Kentucky has the authority to set up a police court. In *Fay* v. *New York*, 332 U.S. 261 (1947), this Court upheld New York's "special" jury system, writing:

> "The function of the . . . Fourteenth Amendment . . . is not to prescribe procedures but is essentially to protect the integrity of the trial process by whatever method the state sees fit to employ . . . . [Courts] must be organized to hear, try and determine on the evidence and the law. But beyond requiring conformity to standards of fundamental fairness that have won legal recognition, this Court has been careful not so to interpret upon the several states whose legal systems stem from diverse sources of law and reflect different historical influences." 332 U.S. 294.

Acknowledging the states' power to organize their own court systems, this Court further wrote in *Fay*:

> "We adhere to this policy of self-restraint and will not use this great centralizing Amendment to standardize administration of justice and stagnate local variations and practice." 332 U.S. 295.

Although addressing itself to the "special" jury system in New York City, this Court's language in *Fay* extends to the states' power to provide a judicial system which includes non-lawyer judges. A constitutionally necessary ingredient in any judicial system that is created is the availability of a fundamentally fair trial. And this right to a fundamentally fair trial extends to all criminal trials, regardless of the nature of the crime with which a defendant is charged. *Argersinger* v. *Hamlin*, 407 U.S.

25 (1972). But we do not believe the constitutional principle of "fundamental fairness", which universally focuses on rights basic to a fair trial for one accused of a wrongful act, *requires* a misdemeanor criminal case be heard before a lawyer judge.

The Fourteenth Amendment to the Federal Constitution requires that no state shall deprive any person of life, liberty, or property, without due process of law. Due process, relative to the tribunal hearing a case, usually has been considered to require only that the tribunal be *fair and impartial.* Citing *Re Murchison,* supra, the Kentucky Court of Appeals stated this proposition in rejecting contentions identical to those made by the appellant herein in *Ditty* v. *Hampton,* Ky., 490 S.W.2d 772 (1973). The allegation that a non-lawyer judge cannot be fair and impartial and preside over a fundamentally fair trial is simply that — an allegation. The mere statement that *a* non-lawyer is not a competent judge does not make *all* non-lawyer judges incompetent.

We concede in the present case the police judge erred. But the record of this case only shows this non-lawyer judge did not afford a fair trial to the appellant, not that *all* non-lawyer judges are unable to conduct a judicially fair trial. Again, the single question actually before the Court is whether power has been lawfully vested by the Kentucky General Assembly to police judges who are not lawyers, not whether that power has been constitutionally exercised. Does the Federal Constitution *require* a lawyer judge in order to guarantee a fundamentally fair trial?

One line of cases offered in support of the appellant's argument that a non-lawyer judge per se may not afford

a fundamentally fair trial to a criminally accused is based upon probable bias of the tribunal and not that the judges were non-lawyers. *Ward* v. *Village of Monroeville,* 409 U.S. 57 (1972) and *Tumey* v. *Ohio,* 273 U.S. 510 (1926). For this reason, these cases are inapposite to the true question at hand. For example, the problem existing under the facts developed in *Ward,* supra, were that under Ohio law, mayors were authorized to sit as judges in cases of ordinance violations and certain traffic offenses. This Court held that because fines levied in the mayor's court produced a substantial part of a village's income, an individual tried in a mayor's court denied him a trial before a disinterested and impartial judicial officer as guaranteed by the Due Process Clause of the Fourteenth Amendment. This case only supports the proposition that one has a fundamental right to a neutral and detached judge. Note that this Court in *Morrissey* v. *Brewer,* 408 U.S. 471 (1972) held that in a parole-revocation proceeding, due process required only a "neutral and detached" hearing body, members of which need not be judicial officers or lawyers.

This Court, in addition to *Ward* and *Morrissey,* also considered the importance of a neutral and detached judicial officer in *Shadwick* v. *City of Tampa,* 407 U.S. 345 (1972). In *Shadwick,* this Court unanimously upheld a Florida law by which court clerks, who were not attorneys or judges, determined probable cause for the issuance of arrest warrants for those charged with having breached municipal ordinances. Such a determination was deemed within the capabilities of the layman and not violative of due process. Mr. Justice Powell, writing the opinion of the Court, stated:

"We find no commandment in either term (magistrate and judicial officer), however, that all warrant authority must reside exclusively in a lawyer or judge." 407 U.S. 349.

Mr. Justice Powell went on to say in *Shadwick*:

". . . The substance of the Constitution's warrant requirement does not turn on the labeling of the issuing party. . . . Thus, an issuing magistrate must meet two tests. He must be *neutral and detached*, and he must be capable of determining whether probable cause exists for the requested arrest or search." (Emphasis supplied.) 407 U.S. 350.

The kinds of legal determinations a non-lawyer magistrate makes before issuing warrants are virtually synonymous with the great majority of legal questions decided in most police court cases. For instance, a warrant may only be issued upon sufficient application showing probable cause. The magistrate must determine:

a. the application and accompanying affidavit(s) comply with all statutory requirements as to form;

b. the actual description of persons, places and things is legally sufficient;

c. the allegations of information source, if other than personal knowledge, are sufficiently stated to satisfy the legal requirements regarding affidavits (akin to a proper foundation);

d. the allegations are properly in the affidavit, and

that they are not unidentified hearsay (akin to questions of admissibility);

e. the allegations are not legally stale;

f. that sufficient facts appear to demonstrate probable cause.

All of these decisions involve questions of law. Perhaps most fundamentally, the last requires a comprehensive knowledge of probable cause judicial decisions. The determination of probable cause is thought by many judges to be the most difficult question to regularly come before them. That concept is relevant to the issuance of warrants and to a determination to bind over a felony defendant for grand jury action on his case.

Thus, the non-lawyer magistrate, expressly approved by this Court in *Shadwick*, supra, is competent to find the required legal decisions, read and comprehend them, and apply them on a case by case basis. In short, this Court has expressly recognized a non-lawyer's ability to think like a judge, to determine difficult legal questions, and to take action which directly affects the individual's personal liberty.

Moreover, it was apparently argued in *Shadwick*, that this Court should make a per se invalidation of Tampa's warrant system on the ground that the issuing magistrate was not a lawyer or a judge. Note that it was not "lawyer judge" but "lawyer or judge." Even so, this Court specifically rejected any per se invalidation. This Court should reject any per se invalidation of a system of non-lawyer judges also.

This Court in *Shadwick* further recognized that a judge or lawyer would normally provide the most desirable review of warrant requests. The appellant herein exhaustively argues in support of his contention that police courts should be presided over by a lawyer judge, by referring to the judicial trend as evidenced by some several states having adopted lawyer judge provisions and the legal writers in the field of judicial reform who advocate this position. All of this lengthy argument does not address itself to the constitutional issues in this case but merely to the broad policy considerations as to what may be the more desirable inferior court tribunal. While we all, as attorneys, may be drawn to the ideal of having lawyer judges, this begs the question — what does the Constitution of the United States *require?* Even if this Court is persuaded that lawyer judges are to be preferred over non-lawyer judges, it should not strike down the entire inferior court system of Kentucky unless it is firmly convinced that the system is actually in violation of what the Constitution *requires;* for, as the Court stated in *Shadwick*:

> ". . . [O]ur federal system warns of converting desirable practice into constitutional commandment." 407 U.S. 353.

In the appellant's attempt to show this Court that a non-lawyer judge is in violation of the Constitution because he is per se unable to afford a fundamentally fair trial to one charged with a misdemeanor, the penalty for which may be incarceration, he argues that if, as held in *Argersinger* v. *Hamlin,* supra, due process requires that the accused be represented by legal counsel, it necessarily follows that due process requires that the court be presided

over by a lawyer. We agree with our Kentucky Court of Appeals who believed it does not so follow and rejected the allegation that the use of non-lawyer judges worked a denial of due process by stating in *Ditty* v. *Hampton,* supra, as follows:

> ". . . The function of the court is not to defend the accused, or to represent him, but to decide fairly and impartially. An accused needs counsel to defend him, as pointed out in *Gideon* v. *Wainwright,* because the government employs lawyers to prosecute him — because our system of criminal justice is an adversary system. But the judge is not one of the accused's adversaries, and is not there either to defend or prosecute him. So the fact that the accused needs a lawyer to defend him does not mean that he needs to be tried before a lawyer judge." 490 S.W.2d 775.

The principle that if there is no accompanying right to counsel the right to trial by jury becomes meaningless, cannot be reasonably further expanded to say that these two rights stated in the Constitution, mandate and constitutionally require that the judge must be a lawyer, which is not stated in the Constitution.

It is argued that the right to counsel implies the right to a lawyer judge who can appreciate and digest legal points made by counsel. However, the fact that one is not an attorney does not mean that one cannot comprehend legal issues. Cf. *Shadwick* v. *City of Tampa,* supra. Moreover, as thoroughly as this Court reviewed the Sixth Amendment right to counsel in *Argersinger,* supra, the Court never suggested that a non-lawyer judge was incompetent to preside over criminal matters within his court's juris-

diction. The Federal Constitution, by judicial construction, extends to a criminal defendant the right to adequate assistance of counsel. But there is nothing before this Court, other than a bald allegation, even suggesting that all non-lawyers will be unable to comprehend counsel's argument. There is nothing in this case to show that non-lawyer police judges, proportionately, convict more defendants, impose higher sentences, or are reversed more in those cases considered *de novo* in a higher court, than lawyer judges. There is no basis for any finding that non-lawyer judges are less fair and impartial in cases in which the defendant, as he is entitled, is represented by counsel who will marshal the evidence and procedure of the opposing counsel. There is nothing to show that the Due Process Clause of the Constitution *requires* judges to be lawyers rather than non-lawyers. Quoting again from our Kentucky Court of Appeals' decision in *Ditty* v. *Hampton,* supra, upon which the Court relied in deciding the present case:

> ". . . [I]t is difficult to find merit in the argument that the completely unrecognized 'right' to be tried by a lawyer judge suddenly, overnight, became *fundamental* when in *Argersinger* v. *Hamlin* a right in this country to counsel in misdemeanor cases finally was given full expression." (Emphasis in original.) 490 S.W.2d 775.

The competency of a particular presiding judge must be determined on a case by case basis whether the judge is a lawyer or a non-lawyer. The fact that a judicial error may have been committed in a single proceeding does not necessarily mean there has been a denial of due process in

all courts of the same classification. The Fourteenth Amendment does not assure immunity from judicial error. Indeed, many lawyer judges make critical errors at trial which are corrected on appeal without labeling the trial judges unconstitutionally incompetent. Cf. *Beck* v. *Washington,* 369 U.S. 541, 554, 555 (1962).

Short of the broad constitutional due process issue at work in this case, we cannot reasonably argue that errors will not occur or that the trial will always be fair in courts presided over by a non-lawyer judge. But with the two-tier system of handling misdemeanor cases in Kentucky, a defendant may find relief from a reasonable likelihood that a fair trial cannot be had or that a fair trial, in fact, was not had in a court not presided over by a lawyer judge. Cf. *Gordon* v. *Justice Court,* 525 P.2d 72 (Cal. 1074), cert. denied, 43 U.S.L.W. 3448 (U.S. Feb. 18, 1975). He has a remedy under Kentucky law.

Under Kentucky's two-tier misdemeanor court system, an accused may challenge the decision of a police court whether the judge was a lawyer or non-lawyer, by a consideration of right to the circuit court. KRS 23.032 states:

> "(1) The defendant may appeal from a judgment of a county, quarterly, justice's or police court imposing a fine or confinement, or both, to the circuit court of the county in which the judgment was rendered.
>
> "(2) The Commonwealth or city shall have no right of appeal to the circuit court from judgments of courts of inferior jurisdiction except that a city

> may appeal where the validity of an ordinance is in issue. After a decision has been rendered in the circuit court on the city's appeal either the city or the defendant may appeal from the circuit court to the Court of Appeals."

While this statutory provision denominated an application for trial *de novo* an "appeal," the right to a new trial is unconditional and exists even when a defendant seeks redetermination of questions of law. No hearing is had directly on the law as with appeals, rather a new trial in the circuit court is granted and the case is docketed like any other criminal case.

In a circuit court in Kentucky a judge is required to be a lawyer with a minimum of eight years experience in the practice of law. Kentucky Constitution, Section 130. Since this circuit court trial "shall be tried anew, as if no judgment has been rendered," Kentucky Rule of Criminal Procedure 12.06, the defendant is actually given an advantage by the presence of the police court system. If the defendant is acquitted in the police court, no more action can be taken against him, but if he is convicted, he has the right to a completely new trial in circuit court, so long as the defendant applies to the circuit court within thirty days of the entry of judgment or order in the police court. Kentucky Rule of Criminal Procedure 12.04.

It should be noted by the Court that the appellant herein did not avail himself of his right to a trial *de novo* in the Circuit Court of Harlan County, but rather chose to file a petition for habeas corpus (Appendix 4-10) attacking the constitutionality of having been adjudicated in the City of Lynch Police Court by the appellee, Judge

Russell. On remand from this Court, 95 S.Ct. 673 (1974), the Kentucky Court of Appeals, speaking through Justice Palmore, stated concerning this factor of this case:

> "Moreover, when this habeas corpus proceeding began and when it was decided in this court there was still time in which the appellant could have secured a trial *de novo* in the Harlan Circuit Court by the simple expedient of an appeal from the judgment of the Lynch Police Court. KRS 23.032; RCr 12.02 - 12.06, incl. Cf. *Colten* v. *Kentucky,* 407 U.S. 104, 112 (1972)." Appendix 66.

This Court had the occasion to take a good, long hard look at Kentucky's two-tier system of courts in the case of *Colten* v. *Kentucky,* 407 U.S. 104 (1972). As this Court pointed out in *Colten*:

> ". . . The right to a new trial is absolute. A defendant need not allege error in the inferior court proceeding. If he seeks a new trial, the Kentucky statutory scheme contemplates that the slate be wiped clean. Ky. Rule Crim. Proc. 12.06. Prosecution and defense begin anew. By the same token neither the judge nor jury that determines guilt or fixes a penalty in the trial de novo is in any way bound by the inferior court's findings or judgment. The case is to be regarded exactly as if it had been brought there in the first instance." 407 U.S. 113.

Further in *Colten*, this Court stated:

> ". . . In reality his [defendant's] choices are to accept the decision of the judge and the sentence imposed in the inferior court or to reject what in effect

> is no more than an offer in settlement of his case and seek the judgment of judge or jury in the superior court, with sentence to be determined by the full record made in that court." 407 U.S. 119.

We do not rely on Kentucky's two-tier system of misdemeanor courts, providing for a trial *de novo* in circuit court, to clear up the alleged constitutional infirmity in the use of non-lawyer judges in police court. This is because the use of a non-lawyer judge presents no constitutional infirmity. The two-tier system of courts simply acts as a guarantee for *total* relief, not *possible* relief based on the lower court record, to any defendant who feels he has been denied in practice a fair trial in *any* police court in Kentucky, irrespective of whether the judge was a lawyer or not.

Ward v. *Monroeville,* supra, is not supportive of the appellant's claims against the *de novo* trial provision. This Court stated in *Ward,* "Petitioner is entitled to a ***neutral and detached*** judge in the first instance." (Emphasis supplied) 409 U.S. 61-62. It is clearly recognized that an individual has a constitutional and fundamental right to a fair and impartial tribunal. The trial in a mayor's court was constitutionally tainted because of the mayor's interest in collecting a fine to increase the revenue of his village. A biased judge with such an incentive to convict could not be considered to give a fair trial and we agree a trial *de novo* would not cure this constitutionally based infirmity. But there is no need to look at a trial *de novo* as a curative procedural safeguard in the non-lawyer judge situation since there has been no showing that adjudication by a non-lawyer judge is constitutionally infirm.

Therefore, in view of the fact the appellant has failed to demonstrate an identifiable probability of bias or a reasonable likelihood of denial of due process in trials presided over by non-lawyer judges, it is well to consider this Court's ruling in *Snyder* v. *Commonwealth of Massachusetts,* 291 U.S. 97 (1934):

> "The Commonwealth of Massachusetts is free to regulate the procedures of its court in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental [citations omitted]. Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar." 291 U.S. 105.

Appellees submit the fact that appellant was tried by a non-lawyer judge does not constitutionally *require* that such trials be found to inherently result in the denial of "fundamental fairness shocking to the universal sense of justice." *Kinsella* v. *United States, ex rel Singleton,* 316 U.S. 234 (1960).

B. AN INDIVIDUAL CHARGED WITH A CRIMINAL MISDEMEANOR IN A POLICE COURT WHERE THE POSSIBLE PUNISHMENT UPON CONVICTION MAY BE IMPRISONMENT, IS NOT DENIED EQUAL PROTECTION OF LAW UNDER THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION WHERE THE KENTUCKY GENERAL ASSEMBLY HAS ESTABLISHED DIFFERENT STATUTORY REQUIREMENTS IN ORDER TO BECOME A POLICE COURT JUDGE, DEPENDING UPON THE KENTUCKY CONSTITUTIONAL CLASS OF CITY, BASED UPON POPULATION SIZE, OVER WHICH THE POLICE COURT HAS JURISDICTION.

The appellant has claimed but failed to demonstrate that there is a "fundamental right" to have criminal misdemeanor charges tried before a judge who is a lawyer. Therefore, under the Equal Protection Clause of the Fourteenth Amendment the validity of the differing requirements for police judge, depending upon the classification of the city in which it sits, turns not upon the question of whether the differing requirements for police judge serve "a compelling state interests," but rather upon the question of whether one who attacks these differing requirements can demonstrate that these bear no reasonable or rational relationship to a legitimate state interest. *Shapiro* v. *Thompson*, 394 U.S. 618 (1969).

The Kentucky General Assembly in the exercise of its legislative discretion has varied the qualifications required for police court judges, depending upon the population of the court's jurisdiction. Section 156 of the Kentucky Constitution, supra, requires cities to be classified according to population size and sets the population limitation for each class of city. The General Assembly has

required judges in police courts of first and second class cities, i.e., the most heavily populated cities, to be lawyers, KRS 26.140, 26.150, supra; while police court judges of cities of the third through the sixth classes need not be attorneys, KRS 26.170, 26.190, 26.200, supra. Appellant claims that this variance in the qualifications judges are required to meet, based upon the classification of the cities in which the judges serve, unreasonably discriminates against defendants tried before non-lawyer judges in the third through sixth classes of cities in violation of the Equal Protection Clause of the Fourteenth Amendment. We believe this claim is without merit.

Besides the appellant's failure to show any significant difference in the way in which criminal misdemeanor cases would be handled in the respective police court jurisdictions, the appellant misses the mark as to the workings of the Equal Protection Clause. The right to equal protection applies to the manner in which the law is applied to persons rather than to geographical areas. In *Salsburg* v. *Maryland*, 346 U.S. 545 (1954), this Court wrote:

> "The Equal Protection Clause relates to equality between persons as such rather than areas . . . . 'It [the Equal Protection Clause] means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.' *State of Missouri* v. *Lewis*, 101 U.S. 22, 31. . . ." 346 U.S. 561.

See also *McGowan* v. *Maryland*, 366 U.S. 420 (1961).

Thus, the appellant was entitled to equal protection of

the law as it is applied in Lynch, Kentucky, a city of the fifth class. The appellant's attempt to change the "persons" or "class of persons" standard to one of geography finds no support in the long judicial history of that constitutional doctrine.

In attacking the validity of the Kentucky statutory provisions, the appellant bears a heavy burden of overcoming the presumption in favor of their constitutionality. *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973); *McDonald* v. *Board of Election Commissioners of Chicago,* 394 U.S. 802 (1969); *McGowan* v. *Maryland,* supra; *Salsburg* v. *Maryland,* supra; *Fay* v. *New York,* supra; *Snyder* v. *Massachusetts,* supra *Graham* v. *West Virginia,* 224 U.S. 616 (1911); *Lindsey* v. *National Carbonic Gas Co.,* 220 U.S. 61 (1910); *Missouri* v. *Lewis,* 101 U.S. 22 (1879).

In *McDonald,* in upholding the Illinois absentee ballot statutory provision which excluded inmates in state correctional facilities, this Court stated:

> "The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them." 394 U.S. 809.

In *San Antonio Independent School District,* supra, this Court examined the Texas statutory scheme for financing public education. This Court wrote:

> ". . . we think it plain that, in substance, the thrust of the Texas system is affirmative and reformatory and, therefore, should be scrutinized under judicial principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution. . . . A century of Supreme Court adjudication under the Equal Protection Clause "affirmatively supports the application of the traditional standard of review, which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes." 411 U.S. 39, 40.

In *Graham,* supra, this Court, upholding a multiple offender sentencing, wrote:

> "The 14th Amendment is not to be construed 'as introducing a factitious equality without regard to practical differences that are best met by corresponding differences of treatment.' . . . A state may make different arrangements for trials under different circumstances of even the same class of offenses. . . ." 224 U.S. 630.

Despite his assigned burden of proof, the appellant has failed completely to show that there is no legitimate state purpose for the challenged statutory provisions. This serious defect in his argument is understood because there exists very substantial legitimate purposes for the use of non-lawyer judges in our inferior criminal court system.

Appellees maintain that the statutory requirements

for police court judges within the classification of cities set forth by the Kentucky General Assembly is a reasonable method for achieving the Commonwealth's legitimate objective of providing a fair, efficient and expeditious police court system for all its citizens. The Kentucky Court of Appeals, in *Ditty* v. *Hampton,* supra, relied on by the court in its decision in this case, presented sound reasons which adequately justify the differing requirements for police court judges in the classification of cities as set forth in KRS 26.140, 26.150, 26.170, 26.190 and 26.200:

> "We can conceive of the following possible reasonable bases for the classification here in question:
>
> 1. The greater volume of court business in the larger cities requires that judges be attorneys to enable the courts to operate efficiently and expeditiously (not necessarily with more fairness and impartiality).
>
> 2. Lawyers with whom to staff the courts are more available in the larger cities.
>
> 3. The larger cities have greater financial resources with which to provide better qualified personnel and better facilities for the courts. Cf. *Metcalf* v. *Howard,* 304 Ky. 498, 201 S.W.2d 197.
>
> That population and area factors may justify classifications within a court system has long been recognized. See *Missouri* v. *Lewis,* 101 U.S. 22, 25 L.Ed. 989. * * *" 490 S.W.2d 776-777.

Logic and experience does sustain the Kentucky Court of Appeals' statement that "the greater volume of court business in the larger cities requires that judges be attorneys to enable the courts to operate efficiently and expeditiously." Police court judges in the smaller cities can operate their case load efficiently and expeditiously without being a lawyer in that the proceedings in the smaller police court will be in all likelihood conducted in a less formal manner, with less vigorous prosecution and with fewer jury trials. Moreover, police court judges in the smaller cities of Kentucky know most, if not all, of the people in the community. A police court need not hear all those cases which it has jurisdiction to hear. In many of the smaller cities, police courts hear only traffic offenses and city ordinance violations and refer the criminal cases to the appropriate quarterly or county court. All of these factors permit the smaller city police court judge to operate their court in as fair a manner without being lawyers as their big city brethren who are lawyers but do not enjoy the "luxuries" of the small town police judge.

As to the second reason stated to justify the difference in requirements for police judges in the six classes of cities in Kentucky, the greater availability of lawyers in the larger cities, the Court should know that of the one hundred twenty counties in Kentucky, there are twenty-four counties with five or less attorneys and eight counties with two or less attorneys.* But more importantly, there

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*Kentucky counties with five or less attorneys: Ballard, 5; Bath, 4; Bracken, 2; Carlisle, 2; Clinton, 4; Crittenden, 4; Cumberland, 3; Edmonson, 3; Elliott, 2; Gallatin, 4; Hancock, 4; Hickman, 3; Jackson, 2; Lee, 5; Lyon, 4; McLean, 3; Menifee, 1; Owsley, 2; Pendleton, 4; Robertson, 2; Rockcastle, 5; Spencer, 4; Trimble, 2; Wolfe, 3. Source: Kentucky and Tennessee Legal Directory, 1974, published by Legal Directories

are additional counties other than these twenty-four that have cities and towns within them that have no lawyers residing within each city's or town's jurisdiction. We need look no further than the present case background to illustrate this fact. The City of Lynch, a fifth-class city, in Harlan County, not one of those counties included in the twenty-four, has no lawyers residing in it. The City of Lynch is approximately 27 miles from the City of Harlan, a fourth class city, which is the county seat.

The appellant argues the transportation capabilities of today and the lawyer density patterns solve the problem of there being too few or no lawyers in certain remote areas in Kentucky. This is to say that the lawyers from the larger communities can shuttle to smaller communities to fill the police judge positions just as in effect must be done today to comply with the requirements of *Argersinger*, supra. But there is one looming problem with this argument. Unlike the situation involved in getting a lawyer appointed to defend an individual accused of a criminal misdemeanor, the residency of the lawyer having nothing to do with being able to defend an accused, the Kentucky Constitution and statutes require residency in the city or town in order to be a police court judge.

A police court judge is a constitutional officer in Kentucky. Section 160 of the Kentucky Constitution, supra, provides that a police judge is to be elected by the

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qualified voters of the city or town, with the proviso that police judges of the fourth, fifth and sixth class cities may be appointed as provided by law. Section 234 of the Kentucky Constitution requires officers to reside in their respective districts, counties or towns and states as follows:

> "§ 234. Officers to reside in their respective counties or towns. — All civil officers for the state at large shall reside within the state, and all district, county, city or town officers shall reside within their respective districts, counties, cities or towns, and shall keep their offices at such places therein as may be required by law."

This Court has held that each state has the power as provided by the Tenth Amendment to prescribe the qualifications of its officers and the manner in which they shall be chosen. Inherent in this is the power of the state to require its officers, e. g., police court judges, to be bona fide residents of their relevant political subdivisions. *Sugarman* v. *Dougall*, 413 U.S. 634 (1973); *Dunn* v. *Blumstein*, 405 U.S. 330 (1972); *Pope* v. *Williams*, 193 U.S. 621 (1904).

Obedient to the mandate of Section 234 of the Kentucky Constitution, KRS 26.200, supra, requires in order to be eligible to be a police court judge in a city of the fifth or sixth class, that the individual be a resident and voter of the city for a year next preceding his election or appointment. Chapter 87 of the Kentucky Revised Statutes, covering the organization and government of cities of the fifth class, specifically KRS 87.160, is also obedient to the mandate of Section 234 and states as follows:

"Except as provided in KRS 95.710 (police and fire

department), no person shall be eligible to hold any office in the city unless he is a resident and qualified voter in the city and has resided in the city for one year next preceding the date of his election or appointment. No person shall be eligible to hold the office of mayor or councilman unless he is a property holder in the city."

Note that although Section 160 of the Kentucky Constitution would permit the appointment of a police court judge in a fifth class city, KRS 87.170(1) provides in relevant part that:

> "(1) The members of the city council, mayor and police judge shall be elected by the qualified voters of the city. . . ."

This is to say the General Assembly by law has mandated that a police court judge in a city of the fifth class shall be elected by the qualified voters of the city, not appointed to the position.

You cannot compel lawyers to reside in a particular city. Moreover, in those localities where there are several lawyers, these lawyers may be unable due to a conflict of interest to assume the judicial post of police court judge.

One must also consider the effects of requiring lawyer judges in police courts because such a rigid requirement, not based upon the Federal Constitution, would have far-reaching impact on a judiciary system as we have in Kentucky, geared heavily on non-lawyer judges. In Kentucky, a county court judge, who also acts as the juvenile court judge and quarterly court judge, and county justices of

the peace are not required to be lawyers. Kentucky Constitution §§ 99, 100, 139, 140, 142.

Thus, the people of this State, through their elected representatives in the General Assembly, have provided for non-lawyer judges to serve the judicial needs of a large part of the state where otherwise those needs would be ignored. Those needs constitute a legitimate state purpose for enacting these constitutional and statutory provisions and accords with Mr. Justice Brandeis' federalism theory frequently approved by this Court that each state is free to serve as a "laboratory" for the development of sound practices consonant with the fundamental fairness doctrine. *New York State Ice Co.* v. *Liebmann,* 285 U.S. 262 (1932); Brandeis, J., dissenting.

The third factor justifying the different requirements for police court judges depending upon the classification of city, the financial resources available, is a statement of plain economics. To *require* the replacing of the non-lawyer judges with lawyers, even were they available, would be economically prohibitive. Those few lawyers that do reside in the smaller cities would not desire to impinge upon the earning capacity of their private practice to assume the burdens of a police judge position.

The laws providing for police courts and the non-lawyer judges who preside in them should not be struck down solely on the basis of speculation and innuendo completely devoid of any factual basis for their alleged constitutional invalidity. The appellant has shown nothing to cause this Court to elevate the lawyer police court judge to a constitutional right. Any disparity in the ability by smaller cities to finance a lawyer police court judge does

not violate the right to equal protection. Cf. *San Antonio Independent School District,* supra.

We submit that the differing requirements for police court judges in the six classes of cities in Kentucky is rational and reasonable and does not deny citizens of any city the right to equal protection of the laws.

In reviewing the long history of non-lawyer judges and the vital role they have played and continue to play in our judicial system, we are reminded of Mr. Justice Holmes' comment in *Jackman* v. *Rosenblaum Co.,* 260 U.S. 22, 31 (1922):

> "If a thing has been practiced for two hundred years by common consent, it will need a strong case for the fourteenth amendment to affect it * * * *"

When it is considered that the Federal Constitution does not even require a member of this Court to be a lawyer, the more stringent qualification urged by the appellant is all the more irreconcilable. For surely the members of the lowest level of Kentucky's judiciary may not fairly be required to possess law degrees which are not demanded of members of the United States' highest tribunal.

CONCLUSION

The appellees believe the laws authorizing the use of non-lawyers as police court judges in the Commonwealth of Kentucky are well within the boundaries of due process of law. The fact that a non-lawyer is presiding in a given police court does not in itself demonstrate an equal protection violation. There is no merit in the appellant's attack

on the constitutionality of the state statutory provisions for non-lawyer police court judges. For these reasons, the appellees submit the judgment entered in the case by the Kentucky Court of Appeals should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert L. Chenoweth, one of counsel for appellees, hereby certify that the foregoing Brief for Appellees was served on appellant by depositing three copies each of same in the United States mail, first class postage prepaid, this 30 day of September 1975, addressed to counsel for appellant, HON. CHARLES E. GOSS, Central Street, Harlan, Kentucky 40831, and HON. DEAN HILL RIVKIN, 8 Sherman Street, Cambridge, Massachusetts 02138, of Counsel.

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1409

LONNIE NORTH,

Appellant,

vs.

C. B. RUSSELL AND NATHANIEL "TRAP" HELTON, JAILER OF HARLAN COUNTY,

Appellees.

On Appeal From The Court Of Appeals Of Kentucky

REPLY BRIEF FOR APPELLANT WITH NEW AUTHORITIES

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On Appeal From The Court Of Appeals Of Kentucky

REPLY BRIEF FOR APPELLANT WITH NEW AUTHORITIES

I.

FAY v. NEW YORK, CITED BY APPELLEES, MUST BE VIEWED IN ITS HISTORICAL CONTEXT.

Fay v. New York, 332 U.S. 261 (1947), cited by Appellees on page 15 of their brief and by *Amicus*, New York State Association of Magistrates, on page 16 of its brief implies a standard and scope of Supreme Court review of state criminal actions which is no longer

viable. *Fay v. New York, supra,* was decided by this Court in 1947 and the case must be viewed in its historical context.

Whatever definition may be currently or historically attributed to "due process" and whatever scope of judicial review of state criminal actions may appertain, currently or historically, it is clear that neither concept is static and that a good many things have happened in terms of Fourteenth Amendment rights since 1947.[1] The development of both concepts have been characterized by ebbs and flows, see Robert C. McCloskey, *The Modern Supreme Court,* Harvard University Press (1972), and the period from 1946 to 1953 seems to have been an era of relative quiet in terms of due process development and sometimes, even, retreat.[2]

II.

THE ABILITY TO DETERMINE PROBABLE CAUSE DOES NOT IMPLY THE ABILITY TO CONDUCT A FULL-BLOWN CRIMINAL TRIAL.

Both the Appellees and New York State Magistrates' Association contend that, because this Court in *Shadwick v. City of Tampa,* 407 U.S. 345 (1972), approved the issuance of a warrant of arrest by a non-

[1] It has been suggested that *Fay* has been overruled, see *Duncan v. Louisiana,* 391 U.S. 145, 185, Note 25 (1967). See also Note of Justice Douglas, concurring in *Alexander v. Louisiana,* 405 U.S. 625 (1972), at page 642.

[2] McCloskey, supra, 57-126; Thomas I. Emerson and David Haber, *Political and Civil Rights in the United States* (1952).

lawyer clerk,[3] there is somehow imputed to a lay judge the ability to conduct a full-blown criminal trial. This conclusion is neither supported by the clear language of *Shadwick* nor by any reasonable interpretation of the opinion in that case.

A determination of probable cause followed by the issuance of a warrant for arrest or search is not analogous to the conduct of a full-blown criminal trial which leads to a deprivation of liberty.

III.

SUPERFICIAL TRAINING COURSES ARE NO SUBSTITUTE FOR COMPREHENSIVE LEGAL EDUCATION.

The New York State Magistrates' Association advances argument that lay judges in New York (and perhaps in other states) are adequately trained to conduct criminal trials and, for that reason, this Court should not apply *per se* invalidation of imprisonment in trials conducted by lay judges.

We submit that cram courses of the kind described in the brief of the *amicus* do not dispel the specter of due process abridgment inherent in every imprisonment imposed by a lay judge.

Amicus described in its brief, page 13, the educational level of those magistrates constituting the judicial laity in the State of New York. According to those figures,

[3] Appellees' suggestion at page 19 of their brief, that ". . . it was apparently argued in *Shadwick* that this Court should make a *per se* invalidation of Tampa's warrant system on the ground that the issuing magistrate was not a lawyer or a judge" is in error. An examination of appellant's brief on the merits in *Shadwick, supra,* and his reply brief shows that no such argument was advanced.

only 16% of the lay judges presently presiding in the State of New York have the minimum educational qualifications necessary to even *gain admission* to an accredited law school. To argue that a cram course is adequate to prepare a layman, not even possessing such educational requirements, to preside in a full-blown criminal trial is untenable.[4]

The Supreme Court of California, in *Gordon v. Justice Court*, 525 P. 2d 72 (Cal., 1974), properly rejected an argument, advanced by the State of California, that California's lay justice training program was adequate to assure provision of due process rights in a criminal case involving imprisonment. The California system of cram courses and examination of lay judges received close scrutiny in *Gordon v. Justice Court, supra*, and was found to be wanting. Similarly, the Utah state courts are examining their own training program for lay judges and have determined that that system of training is likewise unsatisfactory. See *Amicus* brief of Salt Lake Legal Defenders Association.

Is not the possession of a license to practice law in the state involved the only reasonable way to assure that, uniformly, there will be judges having sufficient legal training to preside in a criminal trial?

[4] Chief Justice Burger in his annual report on *The State of the Judiciary, American Bar Association, Mid-Winter Meeting, February 23, 1975*, noted that even a fully accredited legal education does not always qualify a lawyer to serve as an effective participant in a criminal proceeding. See also *New Administration Rules Proposed for Federal District Courts*, American Bar Association Journal, 61 ABAJ 945.

IV.

A REQUIREMENT THAT SENTENCES OF IMPRISONMENT BE IMPOSED ONLY AFTER TRIAL PRESIDED OVER BY LAWYER-JUDGES WOULD NOT UNDERMINE THE ADMINISTRATION OF CRIMINAL JUSTICE IN NEW YORK STATE.

The New York State Magistrates' Association predicts in its *Amicus* brief that a *per se* rule of unconstitutionality in this case would produce chaos in the criminal processes of the State of New York. The Association predicts that such a rule would (1) require a new court system; (2) result in intolerable costs; (3) result in "clogged calendars" and "inconvenience for litigants". We think that the New York State Magistrates' Association is altogether too pessimistic.

First, the assertion that a *per se* rule of unconstitutionality in this case would require a new court system in the State of New York is precisely that—an assertion. A close review of the courts in the State of New York indicates otherwise. In 1973, town and village courts in New York disposed of 1,571,265 criminal cases.[5] Moreover, during that same year, fewer than 25,000 persons were committed to county penitentiaries and jails for non-felony offenses.[6] Thus, not more than 2% of all criminal trials in New York State's town and village courts resulted in actual imprisonment.[7] These

[5] State of New York, The Judicial Conference and Office of Court Administration, *Twentieth Annual Report*, 1975, Table 22, Page 53.

[6] State of New York, Commission of Corrections, *Forty-Seventh Annual Report*, 1973, Appendix B, Page 3, and Table entitled, "Reasons for Commitment—Sentenced to Jail of County".

[7] Moreover, this percentage figure includes all imprisonment terms, including those imposed by the lawyer judges of the city and district courts who also sentence to county jails and penitentiaries.

statistics do not support *Amicus'* position that a new court structure would be required to provide lawyer judges to the relatively small number of persons actually receiving terms of imprisonment from town and village courts.

Secondly, *Amicus* complains that a *per se* rule of unconstitutionality in this case would result in an "intolerable expense" which would be "catastrophic", *Amicus* brief, page 26. We would point out that the guarantee of due process in any system of government is expensive and requires an outlay of funds greater than that required by any system less vigilant in its protection of individual rights. Even so, we do not feel that such a *per se* rule in this case would overtax New York State's resources when reference is made to budgetary figures for last fiscal year. The Association's projection of a $70 million dollar increase in costs envisions a complete restructuring of the substructure of New York State's court system. As we have said, no showing has been made that such restructuring is necessary. Even so, during the fiscal year ending March 31, 1975, the state's share of the costs of the court system was estimated at $69.99 million.[8] Since the total state budget for the same period was estimated at $9.794 billion dollars,[9] the courts' share of the estimated state budget represents considerably less than 1% of the total, a modest share considering their importance.

Finally, the prediction that a *per se* rule would result in "clogged calendars" and "tremendous inconvenience for litigants" is an assertion only. It is hard to see how

[8] State of New York. Judicial Conference and Office of Court Administration, *Special Six-Month Report*, 1975, Pages 5-7.

[9] State of New York, *Annual Budget Message*, 1975-1976.

the provision of lawyer-judges to less than 2% of accused misdemeanants could produce administrative chaos in the courts of New York. New York law makes virtually every traffic infraction punishable by both fine and imprisonment.[10] Most of the one and one-half million cases handled by Town and Village Courts during 1973 appear to be traffic infractions.[11] Yet, jail sentences seem to be imposed in only a relatively few of such traffic cases.[12] It would appear that removal of jail terms from most traffic infractions has already occurred in New York State. See, e.g. *Argersinger v. Hamlin*, 407 U.S. 25 (1972), Footnote 10, at Page 38. *De jure* decriminalization of such infractions would appear to be a viable option available to New York State if it should desire to retain its lower court structure intact and still meet a requirement of lawer judges in all cases in which actual imprisonment results.[13] And rules providing for reference by lay judges, of all cases in which imprisonment seems to be appropriate, to district courts presided over by law-trained judges would seem to be another of

[10] New York Code, *Vehicle and Traffic Law*, Titles I through VII and Title IX, § 1800.

[11] State of New York, The Judicial Conference and Office of Court Administration, *Twentieth Annual Report*, 1975, Table 22, Page 53.

[12] Forty-Seventh Annual Report of New York State Commission of Corrections, 1973, Supra, Footnote 6.

[13] This Court in *Argersinger v. Hamlin*, 407 U.S. 25 (1972) said: "How crimes should be classified is largely a state matter. The fact that traffic charges fall within the category of 'criminal prosecutions' does not necessarily mean that many of them will be brought into the class where imprisonment actually occurs", 407 U.S. at 38.

the several options available to New York.[14] Retention of jurisdiction of non-imprisonment cases by lay town and village courts would not collide with the prophylactic rule sought in this case, and reference of imprisonment cases to lawyer judges would seem to portend no great tribulation for the state's budget, the lay magistrates, or for the trial calendars.

NEW AUTHORITIES

I.

THE RECENTLY ARTICULATED RIGHT OF SELF-REPRESENTATION INCREASES THE NEED FOR LAWYER JUDGES.

Since this Court's decision in *Faretta v. California*, 95 S. Ct. 2525 (1975), many defendants have a right to act as their own counsel. This right of self-representation makes even more critical the role of the judge and increases the danger of over-reliance by untrained judges upon the prosecutor.

In *Faretta, supra*, Mr. Justice Blackmun, in his dissent, cast the question:

> "Must the trial court treat the pro se defendant differently than it would professional counsel?"

The answer has traditionally been "yes".

[14] This Court in *Argersinger v. Hamlin*, supra, at page 40, said: "Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts," 407 U.S. at 40.

Chief Justice Burger in the same case observed:

> ". . . the trial judge is not simply an automaton who insures that technical rules are adhered to. [He is] charged with the duty of insuring that justice, in the broadest sense of that term, is achieved in every criminal trial".

In a trial conducted by a judge not fully trained in the law, what assurance is there that justice will be achieved in every such criminal trial?

II.

THE RECENTLY ARTICULATED RIGHT TO CLOSING ARGUMENT IMPLIES A COROLLARY RIGHT TO A LAW-TRAINED JUDGE.

Herring v. New York, 95 S. Ct. 2550 (1975), ties the right of conclusionary argument to the right of effective counsel. The prophylactic rule articulated in that case conferring the absolute right of summation upon defendants and their counsel even in non-jury cases implies the due process necessity of a fully-informed judge and suggests a similar abridgment of the right to effective counsel in those cases presided over by judges not able by training, knowledge and experience to comprehend such argument of counsel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Reply Brief for Appellant were served upon Honorable Wix Unthank, Commonwealth Attorney, Harlan, Kentucky 40831, Attorney of Record for Appellees, C. B. Russell and Nathaniel "Trap" Helton, and upon Honorable Ed W. Hancock, Attorney General, Commonwealth of Kentucky, Frankfort, Kentucky 40601, by mailing same, postage prepaid, on this 30th day of October, 1975.

Charles E. Goss

Charles E. Goss

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1469

LONNIE NORTH ..... APPELLANT

VS.

C. B. KESSEL AND NATHANIEL "TRAP" HELTON, JAILER OF HARLAN COUNTY ..... APPELLEES

ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

SUPPLEMENTAL BRIEF FOR APPELLEES

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October Term, 1974

No. 74-1409

LONNIE NORTH ..... APPELLANT

VS.

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ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

SUPPLEMENTAL BRIEF FOR APPELLEES

MAY IT PLEASE THE COURT:

RECENT DEVELOPMENTS IN JUDICIAL REFORM IN THE COMMONWEALTH OF KENTUCKY.

The purpose of this supplemental brief for the appellees in this case is to inform the Court of recent developments in judicial reform in the Commonwealth of Kentucky within the ambit of the Tenth Amendment to the Federal Constitution authorization to the states to develop their own court systems.

The General Assembly of the Commonwealth of Kentucky at its 1974 session, by Senate Bill 183, enacted an act proposing an amendment to the Constitution of Kentucky relating to the Judicial Branch of Government. This act proposed the repealing of certain sections of the Constitution of Kentucky and enacting in lieu thereof provisions relative to the judicial power of the Commonwealth. Following, in its entirety, is Senate Bill 183:

"Acts of the General Assembly
CHAPTER 84
(S.B. 183)

AN ACT proposing an amendment to the Constitution of Kentucky relating to the Judicial Branch of Government.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section 1. It is proposed that the present Constitution of Kentucky be amended by repealing present Sections 109 through 139, 141 and 143, and enacting in lieu thereof provisions to read, be numbered and be entitled as follows:

THE JUDICIAL DEPARTMENT

Section 109. *The judicial power; unified system; impeachment.* The judicial power of the Commonwealth shall be vested exclusively in one Court of Justice which shall be divided into a Supreme Court, a Court of Appeals, a trial court of general jurisdiction known as the Circuit Court and a trial court of limited jurisdiction known as the District Court. The court shall constitute a unified judicial system for operation and administration. The impeachment powers of the General Assembly shall remain inviolate.

The Supreme Court

Section 110. *Composition; jurisdiction; quorum; special justices; districts; Chief Justice.* (1) The Supreme Court shall consist of the Chief Justice of the Commonwealth and six Associate Justices.

(2)(a) The Supreme Court shall have appellate jurisdiction only, except it shall have the power to issue all writs necessary in aid of its appellate jurisdiction, or the complete determination of any cause, or as may be required to exercise control of the Court of Justice.

(b) Appeals from a judgment of the Circuit Court imposing a sentence of death or life imprisonment or imprisonment for twenty years or more shall be taken directly to the Supreme Court. In all other cases, criminal and civil, the Supreme Court shall exercise appellate jurisdiction as provided by its rules.

(3) A majority of the Justices of the Supreme Court shall constitute a quorum for the transaction of business. If as many as two Justices decline or are unable to sit in the trial of any cause, the Chief Justice shall certify that fact to the Governor, who shall appoint to try the particular cause a sufficient number of Justices to constitute a full court for the trial of the cause.

(4) The Court of Appeals districts existing on the effective date of this amendment to the Constitution shall constitute the initial Supreme Court districts. The General Assembly thereafter may redistrict the Commonwealth, by counties, into seven Supreme Court districts as nearly equal in population and as compact in form as possible. There shall be one Justice from each Supreme Court district.

(5)(a) The Justices of the Supreme Court shall

elect one of their number to serve as Chief Justice for a term of four years.

(b) The Chief Justice of the Commonwealth shall be the executive head of the Court of Justice and he shall appoint such administrative assistants as he deems necessary. He shall assign temporarily any Justice or Judge of the Commonwealth, active or retired, to sit in any Court other than the Supreme Court when he deems such assignment necessary for the prompt disposition of causes. The Chief Justice shall submit the budget for the Court of Justice and perform all other necessary administrative functions relating to the court.

The Court of Appeals

Section 111. *Composition*; *jurisdiction*; *administration*; *panels.* (1) The Court of Appeals shall consist initially of fourteen judges, an equal number to be selected from each Supreme Court district. The number of judges thereafter shall be determined from time to time by the General Assembly upon certification of necessity by the Supreme Court.

(2) The Court of Appeals shall have appellate jurisdiction only, except that it may be authorized by rules of the Supreme Court to review directly decisions of administrative agencies of the Commonwealth, and it may issue all writs necessary in aid of its appellate jurisdiction, or the complete determination of any cause within its appellate jurisdiction. In all other cases, it shall exercise appellate jurisdiction as provided by law.

(3) The Judges of the Court of Appeals shall elect one of their number to serve as Chief Judge for a term of four years. The Chief Judge shall exercise such authority and perform such duties in the administration of

the Court of Appeals as are prescribed in this section or as may be prescribed by the Supreme Court.

(4) The Court of Appeals shall divide itself into panels of not less than three judges. A panel may decide a cause by the concurring vote of a majority of its Judges. The Chief Judge shall make assignments of Judges to panels. The Court of Appeals shall prescribe the times and places in the Commonwealth at which each panel shall sit.

The Circuit Court

Section 112. *Location*; *circuits*; *composition*; *administration*; *jurisdiction.* (1) Circuit Court shall be held in each county.

(2) The Circuit Court Districts existing on the effective date of this amendment to the Constitution shall continue under the name Judicial Circuits, the General Assembly having power upon certification of the necessity therefor by the Supreme Court to reduce, increase or rearrange the Judicial Districts. A Judicial Circuit composed of more than one county shall be as compact in form as possible and of contiguous counties. No county shall be divided in creating a Judicial Circuit.

(3) The number of Circuit Judges in each district existing on the effective date of this amendment shall continue, the General Assembly having power upon certification of the necessity therefor by the Supreme Court, to change the number of Circuit Judges in any Judicial Circuit.

(4) In a Judicial Circuit having only one Judge, he shall be the Chief Judge. In Judicial Circuits having two or more Judges, they shall select bienially a Chief Judge, and if they fail to do so within a reasonable time,

the Supreme Court shall designate the Chief Judge. The Chief Judge shall exercise such authority and perform such duties in the administration of his Judicial Circuit as may be prescribed by the Supreme Court. The Supreme Court may provide by rules for administration of Judicial Circuits by regions designated by it.

(5) The Circuit Court shall have original jurisdiction of all justiciable causes not vested in some other court. It shall have such appellate jurisdiction as may be provided by law.

The District Court

Section 113. *Location; districts; composition; administration; trial commissioners; jurisdiction.*

(1) District Court shall be held in each county.

(2) The Circuit Court Districts existing on the effective date of this amendment shall continue for District Court purposes under the name 'Judicial Districts,' the General Assembly having power upon certification of the necessity therefor by the Supreme Court to reduce, increase or rearrange the districts. A Judicial District composed of more than one county shall be as compact in form as possible and of contiguous counties. No county shall be divided in creating a Judicial District.

(3) Each Judicial District created by this amendment initially shall have at least one District Judge who shall serve as Chief Judge and there shall be such other District Judges as the General Assembly shall determine. The number of District Judges in each Judicial District thereafter shall be determined by the General Assembly upon certification of necessity therefor by the Supreme Court.

(4) In a Judicial District having only one Judge

he shall be the Chief Judge. In those districts having two or more Judges they shall select biennially a Chief Judge and if they fail to do so within a reasonable time, the Supreme Court shall designate the Chief Judge. The Chief Judge shall exercise such authority and perform such duties in the administration of his district as may be prescribed by the Supreme Court.

(5) In any county in which no District Judge resides the Chief Judge of the district shall appoint a Trial Commissioner who shall be a resident of such county and who shall be an attorney if one is qualified and available. Other Trial Commissioners with like qualifications may be appointed by the Chief Judge in any Judicial District upon certification of the necessity therefor by the Supreme Court. All Trial Commissioners shall have power to perform such duties of the District Court as may be prescribed by the Supreme Court.

(6) The District Court shall be a court of limited jurisdiction and shall exercise original jurisdiction as may be provided by the General Assembly.

Clerks of Courts

Section 114. *Selection; removal.* (1) The Supreme Court shall appoint a clerk to serve as it shall determine.

(2) The Court of Appeals shall appoint a clerk to serve as it shall determine.

(3) The clerks of the Circuit Court shall be elected in the manner provided elsewhere in this Constitution. The clerks of the Circuit Court shall serve as the clerks of the District Court. The clerks of the Circuit Court shall be removable from office by the Supreme Court upon good cause shown.

Appellate Policy; Rule-Making Power

Section 115. *Right of appeal; procedure.* In all cases, civil and criminal, there shall be allowed as a matter of right at least one appeal to another court, except that the Commonwealth may not appeal from a judgment of acquittal in a criminal case, other than for the purpose of securing a certification of law, and the General Assembly may prescribe that there shall be no appeal from that portion of a judgment dissolving a marriage. Procedural rules shall provide for expeditious and inexpensive appeals. Appeals shall be upon the record and not by trial de novo.

Section 116. *Rules governing jurisdiction, personnel, procedure, Bar membership.* The Supreme Court shall have the power to prescribe rules governing its appellate jurisdiction, rules for the appointment of commissioners and other court personnel, and rules of practice and procedure for the Court of Justice. The Supreme Court shall, by rule, govern admission to the Bar and the discipline of members of the Bar.

Offices of Justices and Judges

Section 117. *Election.* Justices of the Supreme Court and Judges of the Court of Appeals, Circuit and District Court shall be elected from their respective districts or circuits on a nonpartisan basis as provided by law.

Section 118. *Vacancies.* (1) A vacancy in the office of a Justice of the Supreme Court, or of a Judge of the Court of Appeals, Circuit or District Court which under Section 152 of this Constitution is to be filled by appointment by the Governor shall be filled by the Governor from a list of three names presented to him by the appropriate Judicial Nominating Commission. If the Gov-

ernor fails to make an appointment from the list within sixty days from the date it is presented to him, the appointment shall be made from the same list by the Chief Justice of the Supreme Court.

(2) There shall be one Judicial Nominating Commission for the Supreme Court and the Court of Appeals, one for each Judicial Circuit, and one for each Judicial District, except that a circuit and district having the same boundary shall have but one Judicial Nominating Commission. Each commission shall consist of seven members, one of whom shall be the Chief Justice of the Supreme Court, who shall be chairman. Two members of each commission shall be members of the Bar, who shall be elected by their fellow members. The other four members shall be appointed by the Governor from among persons not members of the Bar, and these four shall include at least two members of each of the two political parties of the Commonwealth having the largest number of voters. Members of a Judicial Circuit or Judicial District Nominating Commission must be residents of the circuit or district, respectively, and the lawyer members of the commission shall be elected by the members of the Bar residing in the circuit or district, respectively. The terms of office of members of Judicial Nominating Commissions shall be fixed by the General Assembly. No person shall be elected or appointed a member of a Judicial Nominating Commission who holds any other public office or any office in a political party or organization.

Section 119. *Terms of office.* Justices of the Supreme Court and Judges of the Court of Appeals and Circuit Court shall severally hold their offices for terms of eight

years, and Judges of the District Court for terms of four years. All terms commence on the first Monday in January next succeeding the regular election for the office. No Justice or Judge may be deprived of his term of office by redistricting, or by a reduction in the number of Justices or Judges.

Section 120. *Compensation; expenses.* All Justices and Judges shall be paid adequate compensation which shall be fixed by the General Assembly. All compensation and necessary expenses of the Court of Justice shall be paid out of the State Treasury. The compensation of a Justice or Judge shall not be reduced during his term.

Section 121. *Retirement and removal.* Subject to rules of procedure to be established by the Supreme Court, and after notice and hearing, any Justice of the Supreme Court or Judge of the Court of Appeals, Circuit Court or District Court may be retired for disability or suspended without pay or removed for good cause by a commission composed of one Judge of the Court of Appeals, selected by that Court, one Circuit Judge and one District Judge selected by a majority vote of the Circuit Judges and District Judges, respectively, one member of the Bar appointed by its governing body, and two persons, not members of the Bench or Bar, appointed by the Governor. The commission shall be a State body whose members shall hold office for four-year terms. Its actions shall be subject to judicial review by the Supreme Court.

Section 122. *Eligibility.* To be eligible to serve as a Justice of the Supreme Court or a Judge of the Court of Appeals, Circuit Court or District Court a person must be a citizen of the United States, licensed to practice law

in the Courts of this Commonwealth, and have been a resident of this Commonwealth and of the district from which he is elected for two years next preceding his taking office. In addition, to be eligible to serve as a Justice of the Supreme Court or Judge of the Court of Appeals or Circuit Court a person must have been a licensed attorney for at least eight years. No District Judge shall serve who his not been a licensed attorney for at least two years.

Section 123. *Prohibited activities.* During his term of office, no Justice of the Supreme Court or Judge of the Court of Appeals, Circuit Court or District Court shall engage in the practice of law, or run for elective office other than judicial office, or hold any office in a political party or organization.

Section 124. *Conflicting provisions.* Any remaining sections of the Constitution of Kentucky as it existed prior to the effective date of this amendment which are in conflict with the provisions of amended Sections 110 through 125 are repealed to the extent of the conflict, but such amended sections are not intended to repeal those parts of Sections 140 and 142 conferring nonjudicial powers and duties upon County Judges and Justices of the Peace. Nothing in such amended sections shall be construed to limit the powers otherwise granted by this Constitution to the County Judge as the chief executive, administrative and fiscal officer of the county, or to limit the powers otherwise granted by the Constitution to the Justices of the Peace or County Commissioners as executive, administrative and fiscal officers of a county, or of the Fiscal Court as a governing body of a county.

Section 2. It further is proposed as a part of this

amendment and as a schedule of transitional provisions, for the purposes of this amendment, that:

1. The Judges of the Court of Appeals in office on the effective date of this amendment shall become Justices of the Supreme Court, for the duration of their terms, and the election of successors shall be in accordance with those terms.

2. The Circuit Judges in office on the effective date of this amendment shall be continued therein for the duration of their terms. The term of office of eight years provided in this amendment for Circuit Judges shall apply to the Circuit Judges elected at the election at which this amendment is adopted.

3. The term of office of Judges of the Court of Appeals created by this amendment shall be deemed to commence as of the first Monday in January, 1976. The vacancies existing on that date by virtue of no election having been held for the office in November, 1975 shall be filled in accordance with Section 152 of the present Constitution and Section 118 as created by this amendment.

4. The term of office of Judges of the District Court shall be deemed to commence as of the first Monday in January, 1978, and judges shall be elected at the regular election next preceding that date. The District Court shall be constituted and organized as of the first Monday in January, 1978.

5. The quarterly courts, county courts as judicial bodies, justices' courts and police courts in existence on the effective date of this amendment shall continue in

existence until the first Monday in January, 1978. For that period those courts shall continue to be governed by the present Constitution and none of the provisions of this amendment shall apply to them, except that those courts shall be deemed a part of the unified judicial system and shall be subject to the general control and rule-making power of the Supreme Court. The terms of any police court judges which commence on the first Monday in January, 1976, shall be reduced to two years from that date.

6. The Clerk of the Court of Appeals elected at the election at which this amendment is adopted shall serve as Clerk of the Supreme Court for the term for which he was elected, subject to removal by the Supreme Court for good cause.

7. Until otherwise provided by law the statutes applicable to the present Court of Appeals and not inconsistent with this amendment shall apply to the Supreme Court.

8. All causes and proceedings pending in the present Court of Appeals on the effective date of this amendment are transferred to and shall be decided or otherwise disposed of by the Supreme Court.

9. All causes and proceedings pending in the quarterly courts, county courts as judicial bodies, justices' courts and police courts, on the first Monday in January, 1978, shall then be transferred to and decided by the Circuit Court or the District Court of the area, in accordance with the respective jurisdictions prescribed for the latter courts.

Section 3. This amendment shall be submitted to

the voters of the Commonwealth for their ratification or rejection at the time and in the manner provided for in Sections 256 and 257 of the Constitution of Kentucky and in KRS 119.420, and if so ratified, shall become effective on January 1, 1976.

Approved March 20, 1974"

As mandated by Section 3 of Senate Bill 183, the so-called "Judicial Amendment" for changing the state court system, was submitted to the voters of the Commonwealth for their ratification or rejection on the ballot at the November 4, 1975, election. Kentucky voters passed the Judicial Amendment to the Kentucky Constitution.

The effective date of this Judicial Amendment will be January 1, 1976. However, only the upper three tiers of the four-tier unified system, that is, the Supreme Court, the Court of Appeals, and Circuit Courts, will actually come into effect on January 1, 1976. The fourth and lowest tier, that of the District Courts, will not commence until the first Monday in January 1978 (January 2, 1978). Therefore, all county, quarterly, justice of the peace and police courts will cease to exist at midnight on January 1, 1978.

The provisions of the Judicial Amendment will be beneficial to the bench, the bar, and the citizens of the Commonwealth. The most far-reaching provision of the Judicial Amendment calls for the present county, police and justice's courts, the so-called inferior court system of the Commonwealth, to be combined into one District Court so that there would be one District Court in each county to handle the cases now handled by these lower

courts. See Section 113 of the Judicial Amendment, supra. The cases generally handled by the present inferior court system involve small amounts of money ($500 or less), light criminal penalties (less than twelve months in jail or $500 or both) and other matters such as probate and juvenile.

Moreover, the Judicial Amendment provides for there to be at least one District Judge to be elected in each judicial district, of which there are now existing fifty-five. See Judicial Amendment, Section 113(2), supra. In that a judicial district may be composed of more than one county, there being one hundred twenty counties in the Commonwealth, there may be some counties in which no District Judge resides. The Judicial Amendment, Section 113, in order to provide each county with local courts, requires that the District Judge in these multi-county districts appoint a resident of each county in which no District Court Judge resides to be a Trial Commissioner. The Trial Commissioner must be an attorney if one is qualified and available and would have the power to perform such duties of the District Court as may be prescribed by the Supreme Court. See Judicial Amendment, Section 113(5), supra. It reasonably follows that the new Supreme Court of the Commonwealth will likely provide that the Trial Commissioner can perform all duties of the District Judge who made the appointment.

The degree of impact of the new Judicial Amendment upon the Judicial Branch of Government in the Commonwealth of Kentucky cannot at this point in time be readily measured. Two years will pass before the most

far-reaching provisions for District Courts will go into effect. For that two-year period the present inferior courts, including police courts, shall continue to be governed by the present Constitution and none of the provisions of the Judicial Amendment will apply to these inferior courts except that these courts shall be deemed a part of the unified judicial system and will be subject to the general control and rule-making power of the Supreme Court. Senate Bill 183, Section 2, paragraph 5, supra. The powers of a District Court Trial Commissioner, the recording of proceedings in the District Court, the process of appeal from the District Court, are all matters, amongst others, which must yet be addressed by the Supreme Court or the General Assembly.

The passage of the Judicial Amendment reveals that a significant number of citizens of the Commonwealth desired judicial improvement with an anticipated concomitant betterment of judicial services. Yet, we submit this Judicial Amendment ratified by the voters of the Commonwealth does not moot the basic constitutional issue of whether the Fourteenth Amendment due process and equal protection clauses require a lawyer judge in all situations where an individual charged with a criminal offense, upon conviction, may be imprisoned, which are at work in the present case. The Judicial Amendment appears to clearly authorize the possibility that a non-lawyer District Court Trial Commissioner may have the powers attendant to the lawyer District Court Judge position. We believe this Trial Commissioner provision is certainly in keeping with the right of the Commonwealth of Kentucky to establish its own judicial system under the Tenth

Amendment and also in keeping with the requirements of the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert L. Chenoweth, one of counsel for appellees, hereby certify that the foregoing Supplemental Brief for Appellees was served on appellant by depositing three copies each of same in the United States mail, first class postage prepaid, this 24th day of November, 1975, addressed to counsel for appellant, HON. CHARLES E. GOSS, Central Street, Harlan, Kentucky 40831, and HON. DEAN HILL RIVKIN, 8 Sherman Street, Cambridge, Massachusetts 02138, of Counsel.

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In The

Supreme Court of the United States

October Term, 1975

No. 74-1409

LONNIE NORTH,

Appellant,

vs.

C. B. RUSSELL, et al.,

Appellees.

On Appeal From The Court Of Appeals Of Kentucky

BRIEF OF THE AMERICAN JUDICATURE SOCIETY AS AMICUS CURIAE

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AMENDMENT TO THE BRIEF OF THE
AMERICAN JUDICATURE SOCIETY
AS AMICUS CURIAE

1. Strike from the second full paragraph of page 22;

> The experiences of Nebraska and Oklahoma also suggest that it is possible to provide lawyer judges even in states which have large areas with low population.

Insert in its place:

> The experience of Nebraska also suggests that it is possible to provide lawyer judges even in states which have large areas with low population.

2. Strike from the second full paragraph of page 22:

> Oklahoma allows a non-lawyer to be certified as a Special Judge only when no lawyer candidate for the judgeship can be found. In all of Oklahoma, there is only one non-lawyer Special Judge. See Appendix, *supra*.

3. Strike from pages 11a and 12a the entire section on "Oklahoma", as follows:

OKLAHOMA

(Information acquired from Marian Opala, Administrative Director of the Courts)

Oklahoma law requires bar membership for eligibility for a judgeship. Okla. Const. art. 7, §2 (supreme court); Okla. Const. art. 7, §3 (court of criminal appeals); Okla. Stat. Ann. tit. 20, §30.9 (1962) (intermediate court of appeals); Okla. Const. art.7, §8(g) (district court). Oklahoma law provides specially for any occasion when a lawyer candidate for a district court judgeship cannot be found that a non-lawyer may be appointed as a Special Judge. Okla. Const. art 7, §8(h). The criminal jurisdiction of the non-lawyer Special Judge is limited to misdemeanors punishable by small fines and/or incarceration up to 30 days unless the Special Judge has the written consent of all the parties to hear the case. 20 O.S. 1972, §123 (1974).

In spite of the fact that much of Oklahoma is sparsely populated, only one of Oklahoma's 203 judges is a non-lawyer judge under the Special Judge provision. Okla. Const. art. 7, §8(h).

The professionalization and unification of Oklahoma's court system replaced 240 non-lawyer judges in courts of limited jurisdiction with 44 lawyer magistrates. In spite of the reduction in personnel, the transition was smooth and there was no disruption of law enforcement.

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IN THE

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On Appeal From The Court Of Appeals Of Kentucky

BRIEF OF THE AMERICAN JUDICATURE SOCIETY AS AMICUS CURIAE

The American Judicature Society files this Brief Amicus Curiae pursuant to the written consent of the parties submitted herewith.

INTEREST OF AMICUS CURIAE

The American Judicature Society, hereinafter called the Society, is a private, non-profit membership organization founded in 1913 and dedicated to promoting the effective administration of justice. Among the Society's membership are federal and state judges, leaders of the organized bar, and practicing lawyers, law teachers, government officials and civic leaders.

The Society's activities embrace research in the area of judicial administration, publication of JUDICATURE (the journal of the American Judicature Society) and other materials, conducting state and national conferences on court modernization, and maintenance of an information and consultation service. The Society pioneered in promoting improvement of judicial administration through reforms such as unified court systems, judicial councils, bar unification, the non-partisan merit plan for selecting judges, and adequate judicial compensation.

The Society has long emphasized that ultimately the key to sound judicial administration and effective court organization is a professional, full-time judiciary, wherein all trial court judges possess law degrees and are members of the bar. The Society and its members also believe that each citizen is entitled to equal justice under law. In the case at bar the Court of Appeals of Kentucky has sanctioned a judicial system whereby non-lawyer judges are authorized to preside over criminal trials and empowered to incarcerate. See Jurisdictional Statement of Appellant, pp. 3-4 and Opinion of the Court of Appeals of Kentucky in *North* v. *Russell*, (Ky., March 21, 1975), set out in Appendix 1 of

Appellant's Jurisdictional Statement. It is our contention that such a system violates the due process clause of the Fourteenth Amendment to the United States Constitution and undermines the effective administration of justice.

The entire issue is of vital concern to members of the Society. The Society urges reversal of the judgment of the Court of Appeals of Kentucky because we believe that at the core of our system of justice is the protection and preservation of an individual's freedom. There are compelling reasons why non-lawyer judges should not be permitted to perform judicial functions in proceedings which affect the liberty of the accused.

In view of the direct importance of this case nationally, the Society's executive committee has authorized and instructed the Society's staff to prepare and file an amicus brief in this case.

OPINION BELOW

The Opinion of the Court of Appeals of Kentucky decided March 21, 1975, currently is unreported. It is set out in Appendix 1 of Appellant's Jurisdictional Statement.

JURISDICTION

The jurisdiction of this Court to review by appeal the judgment of the Court of Appeals of Kentucky is conferred by 28 U.S.C. §1257(2). Probable jurisdiction was noted on June 23, 1975.

STATUTORY PROVISIONS INVOLVED

The relevant Kentucky statutory provisions are Sections 26.010, 26.140, 26.150(1) and 26.200 of the Kentucky Revised Statutes (1971). The relevant Kentucky constitutional provision involved is Section 130 of the Kentucky Constitution. The statutory and constitutional provisions are set out in full in Appellant's Jurisdictional Statement, at pp. 5-7.

QUESTIONS PRESENTED

I. Whether Kentucky's lay judge system violates the due process clause of the Fourteenth Amendment by authorizing non-lawyer judges to preside over criminal proceedings involving charges that carry the possibility of a jail sentence.

II. Whether permitting non-lawyer judges to preside over trials of criminal offenses punishable by a jail sentence is adverse to the public interest.

STATEMENT OF CASE

The American Judicature Society adopts Appellant's statement.

SUMMARY OF ARGUMENT

Kentucky's lay judge system, insofar as it authorizes non-lawyer judges to preside over criminal proceedings involving charges that carry the possibility of a jail sentence, violates the due process clause of the Fourteenth Amendment. An accused's right to counsel is rendered meaningless when he is tried before a non-lawyer judge. This Court's extension of the right to counsel as enunciated in *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972), applies to all criminal trials wherein the accused faces the possibility of incarceration. But if the right to counsel is to remain intact, this Court must recognize the concomitant right of an accused to a lawyer judge in criminal proceedings involving charges that carry the possibility of a jail sentence.

The increased complexity of the criminal law has produced a change of conditions which now makes the requirement of a judge trained in the law a constitutional necessity in order to insure an accused a fair trial. In addition, a critical safeguard to an individual's liberty is the assurance that judges who preside over criminal proceedings involving charges that carry the possibility of imprisonment be trained in the law. Empowering non-lawyer judges to incarcerate not only impairs the quality of judicial administration but diminishes the public's image of the judiciary. A decision by this Court requiring a lawyer judge in every criminal case where a term of imprisonment may be imposed will not disrupt the orderly administration of justice in the state court systems. Rather, such a decision will enhance the assurance of justice for the accused who faces the possibility of imprisonment and improve the quality of judicial administration.

ARGUMENT

I.

KENTUCKY'S LAY JUDGE SYSTEM VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BY AUTHORIZING NON-LAWYER JUDGES TO PRESIDE OVER CRIMINAL PROCEEDINGS INVOLVING CHARGES THAT CARRY THE POSSIBILITY OF A JAIL SENTENCE.

A. Permitting Non-Lawyer Judges To Preside Over Trials Of Criminal Offenses Punishable By A Jail Sentence Jeopardizes An Accused's Fundamental Right To A Fair Trial And Effectively Denies Him His Right To Counsel.

Starting with *Powell* v. *Alabama*, 287 U.S. 45 (1932), and continuing through *Gideon* v. *Wainright*, 372 U.S. 335 (1963), and *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972), this Court has confirmed and reaffirmed the fundamental right of an accused to the assistance of counsel. In *Powell*, the Court based the right to counsel on the inability of an accused to defend himself effectively. Mr. Justice Sutherland wrote:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of the law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. 287 U.S. at 68-69.

Justice Sutherland's analysis was quoted with approval in *Gideon*, 372 U.S. at 344, 345 and *Argersinger*, 407 U.S. at 31.

An accused's right to counsel is rendered meaningless when he is tried before a non-lawyer judge. If "intelligent and educated laymen" lack skill in the "science of the law" such laymen serving in a judicial capacity suffer from a similar disability. Just as an accused who faces the possibility of imprisonment is denied due process when deprived of counsel, so an accused is denied due process if a trial judge by virtue of his lack of legal training does not know the law and is unable to interpret and apply the arguments of counsel. An attorney cannot effectively defend his client in a criminal proceeding before a non-lawyer judge who has not been trained either to understand an attorney's role in the legal process or appreciate the import of the legal arguments presented.

Unlike Justice Sutherland's layman, an accused's counsel, by virtue of his training and licensure, is presumed to know whether an indictment is good or bad, is presumed familiar with the rules of evidence, and can be expected to object to incompetent or irrelevant evidence. But if a judge cannot understand or discern the impact of counsel's arguments, an accused's "right to be heard" is of little avail. Clearly, the right to a judge trained in the law is an essential element of due process, and an accused is deprived of a fair trial and is denied due process if a non-lawyer judge is allowed to preside at his trial.

This Court's extension of the right to counsel as enunciated in *Argersinger* applies to all criminal trials wherein the accused faces the possibility of incarceration. But if the right to counsel is to remain intact, this Court must

recognize the concomitant right of an accused to a lawyer judge in criminal proceedings involving charges that carry the possibility of a jail sentence. Recognizing the inherent unfairness of allowing non-lawyer judges to preside over trials of criminal offenses punishable by a jail sentence, the Supreme Court of California has held this practice unconstitutional. *Gordon* v. *Justice Court for Yuba Judicial District of Sutter County*, 12 Cal. 3d 323, 525 P.2d 72, 115 Cal. Rptr. 632 (1974), *cert. denied*, 420 U.S. 938 (1975). The court recognized that the increased complexity of the criminal law has produced a change of conditions which now makes the requirement of a judge trained in the law a constitutional necessity.

Kentucky's lay judge system also makes it folly for an accused to exercise his constitutional right to defend himself. In *Faretta* v. *California*, ... U.S. ....., 95 S. Ct. 2525 (1975), this Court held that a defendant's Sixth Amendment right to counsel necessarily implied the right of an accused to conduct his defense personally. While leaving the theoretical basis of the right to counsel cases unchanged, *Faretta* suggests a corollary right: the right of a defendant who chooses to defend himself to be tried before a judge who is trained in the law. To interpret *Faretta* otherwise in the context of a lay judge system like Kentucky's would negate the safeguards traditionally inherent in conducting one's own defense. A primary rationale for permitting an accused to represent himself at trial is that the presiding judge can and will protect his rights so that justice will prevail. But, for the most part, non-lawyer judges, by definition, cannot do so because of their unfamiliarity with the law. In such a situation the entire criminal proceeding is stripped of legal content.

A defendant who seeks permission to represent himself should still be "made aware of the dangers and disadvantages of self-representation." 95 S. Ct. at 2541. But unless a lay judge believes that his own lack of training in the law will endanger the right of a defendant and so warns him, a defendant probably will be unaware that the judge actually is a layman. Thus, a defendant might go to trial not knowing that the only lawyer in the courtroom is his adversary, the prosecuting attorney. What is more a lay judge is prone to rely on the judgment and advice of the prosecutor, believing that he has legal expertise. Studies of non-lawyer justice of the peace courts have shown that these courts rarely released a defendant after a "probable cause" hearing because the "only source consistently available to explain issues to JPs are the police and the district attorney and most JPs consequently are very prosecutor-oriented." See Hazard, Justice Courts In Oregon, 53 Ore. L. Rev. 407, 430 (1974). Such a situation is fundamentally unfair.

As this Court pointed out in *Faretta*, if a defendant decides to represent himself at trial, the consequences of the decision are limited to that one trial and that one defendant. 95 S. Ct. at 2541. In fact, even wantonly depriving an accused of counsel denies due process only in that one case. But an untrained, unskilled, non-lawyer judge can deny a fair trial to all who appear before him.

B. Permitting Non-Lawyer Judges To Preside Over Trials Of Criminal Offenses Punishable By A Jail Sentence Jeopardizes An Individual's Fundamental Right To Liberty.

In *Argersinger*, this Court underscored the necessity for insuring a fair trial even in prosecutions for petty offenses.

The Court was not convinced that the complexity of the legal and constitutional questions involved in a case increased in proportion to the seriousness of the offense. As an example, the Court cited the trial of vagrancy cases. "While only brief sentences of imprisonment may be imposed, the cases often bristle with thorny constitutional questions," the Court stated. 407 U.S. at 33.

In light of *Argersinger* and recent decisions dealing with civilly committed patients, juvenile delinquents and dangerous sexual offenders, we believe due process requires that lawyer judges preside over criminal proceedings involving charges that carry the possibility of a loss of freedom of any duration. Drawing analogies from the criminal law in cases involving the deprivation of an individual's liberty, this Court has ruled that states cannot commit or imprison citizens arbitrarily. Due process safeguards must be assured either at trial or at any other proceeding wherein an individual's freedom is at issue. See *In re Gault*, 387 U.S. 1 (1967); *In re Winship*, 397 U.S. 358 (1970); *Jackson* v. *Indiana*, 406 U.S. 715 (1972); and *O'Connor* v. *Donaldson*, ... U.S. ....., 95 S. Ct. 2486 (1975).

The Court emphasized in *Gault* that the risk of imprisonment required procedural safeguards. In view of the fact that a juvenile could be "restrained of liberty for years" where his world would become "a building with whitewashed walls, regimented routine and institutional hours," the Court thought it would be "extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process'." 387 U.S. at 27, 28.

In *Winship*, the Court noted that proof beyond a reasonable doubt in criminal trials protected both the majesty of the criminal law and the accused against the possibility

of being jailed unjustly. 397 U.S. at 364. Despite the fact that the proceedings in *Winship* were characterized as "civil", the Court stressed that the individual's potential loss of liberty entitled him to stringent safeguards.

Similarly, in the context of other non-criminal areas, this Court frequently has emphasized that the risk of confinement requires procedural safeguards. In *Jackson*, the petitioner was a 27-year old deaf mute with the mental level of a pre-school child. Charged with two robberies, he was judged incompetent to stand trial and committed until he was certified to be sane. The Court stressed that Jackson "was not afforded any 'formal commitment proceedings addressed to [his] ability to function in society' or to society's interest in his restraint or to the State's ability to aid him in attaining competency through custodial care or compulsory treatment, the ostensible purpose of the commitment." 406 U.S. at 738. At the very least, the Court though due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which an individual is committed.

The Court has also confirmed that in cases involving civil commitment, a state must not only provide procedural safeguards but must have a compelling reason for depriving an individual of his liberty. In *O'Connor*, the respondent had been confined for almost 15 years in a state mental hospital and frequently had been denied release. Reasoning that confining the harmless mentally ill is like jailing the physically unattractive or socially eccentric, this Court held that a state could not "constitutionally confine without more a non-dangerous individual who is capable of surviving safely in freedom." 95 S. Ct. at 2493-2494.

The thrust of all these cases is that incarceration of any kind is an awesome sanction never to be exercised arbitrarily or casually. As soon as an individual is threatened with the loss of his liberty, important constitutional safeguards must be activated. A critical safeguard to an individual's liberty is the assurance that judges who preside over criminal proceedings involving charges that carry the possibility of imprisonment be trained in the law. All the safeguards of the law are useless when placed in the hands of a judge who is untrained in the law. A judge who is trained in the law is, in many instances, the best safeguard against arbitrary deprivations of liberty. As this Court noted in *Gault:* "[U]nbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." 387 U.S. at 18.

II.

PERMITTING NON-LAWYER JUDGES TO PRESIDE OVER TRIALS OF CRIMINAL OFFENSES PUNISHABLE BY A JAIL SENTENCE IS ADVERSE TO THE PUBLIC INTEREST.

A. Empowering Non-Lawyer Judges To Incarcerate Impairs The Quality Of Judicial Administration.

Critics of non-lawyer judges frequently cite the lack of qualifications of these judges, particularly their lack of legal training and their ignorance of judicial procedure. See Advisory Commission on Intergovernmental Relations, *State-Local Relations in the Criminal Justice System,* 14 (1971); Traynor, Rising Standards of Courts and Judges, 1965 J. of the State Bar of California 677, 690; Zimmerman, Courts — Justice of the Peace Courts — Recommendation 21 Ore. L. Rev. 380, 381 (1942); Hazard, Justice Courts In Oregon, *supra* at 428. The fact that non-lawyer

judges lack legal training and generally are ignorant of judicial procedure is detrimental to the administration of justice in their courts.

Each year large numbers of persons across the nation receive their first impressions of courtroom procedure in non-lawyer judge courts. But, for the most part, these courts fail to meet professional judicial standards. For example, in California prior to *Gordon* v. *Justice Court, supra,* some non-lawyer judges frequently boasted of their ignorance of the law, contending that their moral sense was sufficient to allow them to adjudicate correctly. See Ringwald, *Backwoods Justice,* Riverside California Press Enterprise, series of nine articles beginning December 8, 1968. In some cases, non-lawyer judges refused to apply the uniform bail system and to give jury trials because they were "too expensive." *Id.* Believing that the police arrested only guilty people, some non-lawyer judges gave unjustifiable weight to police testimony. *Id.*

There is also evidence that in California and Oregon many non-lawyer judges made little effort to provide counsel for indigent defendants, particularly those defendants charged with less serious offenses. Petition for Alternative Writ of Prohibition and Mandate at 14, 19, 20, *Gordon and Arguijo* v. *Justice Court,* No. 210521 (Sacramento County Superior Court, March 25, 1971); Hazard, Justice Courts in Oregon, *supra* at 426-28. Some non-lawyer judges frequently sentenced improperly. Petition for Alternative Writ of Prohibition and Mandate, *supra,* at 15-16; Hazard, Justice Courts in Oregon, *supra,* at 428. One non-lawyer judge did not even inform the defendant of the charges against him. Petition for Alternative Writ of Prohibition and Mandate, *supra,* at 14. Depositions of non-lawyer justices of

the peace in Mississippi indicate that the justices were unclear as to the extent of their criminal jurisdiction, unable to interpret the law, and incapable of following the rules of evidence when conducting a trial. Depositions of J. K. Bailey, John Sanders and Curtis Underwood, August 28, 1973, *Brown* v. *Vance*, Civil Action No. 72J-91(N) (Consolidated) (S.D. Miss.-Jackson Div., 1973).

The shortcomings of non-lawyer judges are not unique to California, Oregon or Mississippi. Rather, they are inherent in any judicial system staffed by non-lawyer judges. Because of their lack of legal knowledge, non-lawyer judges are incapable of making legal decisions. For example, they cannot deal with challenges to their court procedures. Petition for Alternative Writ of Prohibition and Mandate, *supra*, at 15. Often they are grossly uninformed on criminal law, and consequently sanction inappropriate arrest and search and seizure practices. *Id.* Often they are ignorant of federal and state constitutional requirements and impose self-made and unduly harsh tests of indigency in considering whether or not to appoint counsel. See Hazard, Justice Courts in Oregon, *supra* at 426. Non-lawyer judges not only have difficulty understanding the penalty procedures of their state laws but often there is no procedure for informing them on the subject. *Id.* at 428.

The consequences of these shortcomings are inefficiency and injustice in non-lawyer judge courts, both flowing directly from arbitrary decisions often made by non-lawyer judges, requiring a defendant to appeal his case in order to receive a just adjudication pursuant to law. This ought not to be necessary. The right of appeal and trial *de novo* does not cure the constitutional defect caused by the failure to provide an adequate trial court tribunal in the first

instance. What avail is it that an accused may be able to get more even-handed justice six months or a year hence in another tribunal, after long months of anxious waiting, the expenditure of a great deal of funds, and perhaps even imprisonment? See Keebler, Our Justice of the Peace Courts — A Problem In Justice, 9 Tenn. L. Rev. 1, 4 (1930).

An undue burden is placed upon a defendant when he must bear the expense and inconvenience of an appeal in order to receive a fair trial before a qualified and impartial judge. While a trial *de novo* undoubtedly will correct errors committed in a lay judge court, the "protection afforded by such an appeal can be illusory because it is not realistically available to everyone." See Note, Constitutional Challenge to the Justice of the Peace Court in Mississippi, 44 Miss. L.J. 996, 1007 (1973). The vast majority of defendants who appear in lay judge courts have neither the knowledge nor the funds to prosecute an appeal. See Note, The Justice of the Peace Courts in Florida, 18 U. Fla. L. Rev. 109, 118-119 (1965). For these defendants the decision of an uneducated and often uninformed judge usually constitutes the end of their case.

But even where only a very small percentage of defendants seek a trial *de novo*, such requests invariably clog the courts of general jurisdiction with unexpected and unwanted litigation. In addition, the trial *de novo* system contradicts sound canons of judicial administration by shielding the work of lay judge courts from appellate review. See National Advisory Commission on Criminal Justice Standards and Goals, *Task Force Report*: *Courts* 162 (1973); See also Bing and Rosenfeld, The Quality of Justice in the Lower Criminal Courts of Metropolitan Boston, 7 Crim. L. Bull. 393, 404 (1971). Thus, the trial *de novo*,

which is a concomitant characteristic of a predominantly lay judge lower court system, is inefficient and costly, both for individual defendants and the society at-large.

The inefficiency and injustice of a lay judge system are magnified in cases where a defendant is faced with the possibility of incarceration. Our criminal justice system provides numerous substantive and procedural safeguards to insure that a criminal defendant is not denied his liberty except by due process of law. But many non-lawyer judges are incapable or unwilling to apply these safeguards. The result is injustice for the person incarcerated who is too poor or ignorant to appeal and judicial inefficiency and waste for a person who exercises his right for a completely new trial.

B. Empowering Non-Lawyer Judges To Incarcerate Diminishes The Public's Image Of The Judiciary.

The administration of justice in our Nation's courts of limited jurisdiction poses the greatest challenge to proponents of court reform. As the President's Commission on Law Enforcement and Administration of Justice found, these courts are "lower only in the sense that they are the courts before which millions of arrested persons are first brought, either for trials of misdemeanors or petty offenses or for preliminary hearing on felony charges." See President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* 29 (1967). Although the offenses which are the "business of the lower courts" may be "petty" in respect to the amount of damage they do and the fear that they inspire, the Commission believed that the work of these courts had great implications. *Id.* The Commission noted that insofar as the citizen ex-

periences contact with the criminal court, "the lower court is usually the court of last resort . . . 90 percent of the Nation's criminal cases are heard in the lower courts." *Id.*

Despite the importance of the limited jurisdiction courts, these are the courts where practically all non-lawyer judges serve. This practice generally is defended on a variety of grounds, including the high volume of cases handled by these courts, the necessity of handling these cases rapidly, the lack of law trained judges in the area and the erroneous belief that the disposition of misdemeanors is not an important or demanding judicial function. See National Advisory Commission on Criminal Justice Standards and Goals, *Task Force Report: Courts* 161 (1973). Yet clearly it is in these courts that the public's initial impression of the judiciary usually is forged. If the courts of limited jurisdiction fail to inspire the respect of the public for the judiciary, public fidelity to the law is necessarily impaired. Incarceration by a non-lawyer judge following a proceeding that violates both the spirit and the substance of the law can only undermine respect for the judiciary.

Many organizations have called for the professionalization of the judiciary. See, e.g., The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* 36 (1967); Consensus Statement of the National Conference on the Judiciary, 59 J. Amer. Jud. Soc. 29, 30 (1971); Advisory Commission on Intergovernmental Relations, *State-Local Relations in the Criminal Justice System,* Recommendation 21 (1971); National Advisory Commission on Criminal Justice Standards and Goals, *Task Force Report: Courts,* Standard 8.1 (1973); A.B.A. Commission On Standards Of Judicial Administration, *Court Organization* §1.21 (1974). Proper legal training for all judges is vital if the public's image of the

judiciary is to be enhanced. Untrained, or inadequately trained, non-lawyer judges damage the very legitimacy of the lower trial courts.

C. Empowering Non-Lawyer Judges To Incarcerate Cannot Be Justified By Necessity And Is Contrary To The Present Trend.

Lay judge courts must be understood in their historical context. When these courts were created, centralized administration of justice was difficult because of slow communications and transportation. As a result, each community had its own justice of the peace or city judge. Convenience and ready access to the courts were given a higher priority than judicial competence. See National Advisory Commission on Criminal Justice Standards and Goals, *Task Force Report: Courts* 161 (1973); Note, The Justice of the Peace In Virginia: A Neglected Aspect of the Judiciary, 52 Va. L. Rev. 151 (1966).

But today, even in courts of limited jurisdiction in areas with small populations and where fiscal resources and caseloads appear too small to warrant full-time lawyer judges, judicial incompetence need not be the price a court system pays for convenience. Improved methods of transportation and communication now make it possible for states to create a court system that will guarantee a lawyer judge to every accused faced with the possibility of incarceration. Changing jurisdictional boundaries, removing residency requirements, and utilizing "circuit-riding" lawyer judges are options available to all states to insure the availability of sufficient lawyer judges.

The national trend in court modernization is towards the creation of unified state court systems with a professionalized judiciary. See Appendix: Survey of States Professionalizing Their Judiciary. More and more states are recognizing that the vast range of important judicial responsibilities assigned to courts of limited and special jurisdiction require lawyer judges. See Sixth Illinois Constitutional Convention, Record of Proceedings, v. VI, Part 1, 828-30 (1969-70); C. Joiner, The Michigan Constitution and the Judiciary 22, Michigan Constitutional Convention Studies, (1961); Oklahoma Crime Commission, Comprehensive Law Enforcement Action Plan B-13 (1972). These states are finding ways to staff all their courts with lawyer judges.

To say that non-lawyer judges should not be able to incarcerate is not to say that there is no proper role for the non-lawyer in the judiciary. For example, Alabama, Connecticut, Maryland and New Jersey allow non-lawyers to act as probate court judges. See Appendix, *supra*. Colorado, Ohio and New Jersey allow non-lawyer judges to hear cases involving municipal ordinance violations but do not allow them to incarcerate. *Id.* In Nebraska, non-lawyer associate judges act as clerks for circuit-riding lawyer judges and handle routine cases. *Id.* In California, non-lawyer justice court judges sit in all justice court cases except when a criminal defendant exercises his right to an attorney judge. *Id.* In Virginia, magistrates assist the professionalized judiciary by presiding over preliminary felony hearings. *Id.* Clearly, the non-lawyer can play an important role in judicial administration. However, he ought not to preside over any proceeding wherein an accused faces the possibility of incarceration.

In several states where incarceration by non-lawyer judges is permitted, the practice is under attack. On June 27, 1975, the Tennessee Court of Appeals ruled that only at-

torney juvenile judges could incarcerate juvenile offenders. *Tennessee* v. *Williams,* Coffee Law (Ct. App.—Nashville, decision filed June 27, 1975). The court found, *inter alia,* that to guarantee the right to counsel without also giving the defendant the right to an attorney judge was inherently inconsistent. The court also concluded that because of the complexity of legal proceedings involving the possibility of incarceration, allowing non-lawyer judges to preside over them was likely to result in prejudice. *Id.* at 6. Clearly, it is implausible for Tennessee to guarantee juvenile defendants a lawyer judge when it allows non-lawyer judges to incarcerate adult criminal defendants. It is likely that this case will be the first in a series of challenges to the authority of non-lawyer judges in Tennessee to incarcerate.

On June 8, 1975, an intermediate appellate court in Utah ruled that non-lawyer judges cannot impose imprisonment upon a conviction of offenses over which they otherwise have jurisdiction. *Shelmidine* v. *Jones,* No. 224948 (3rd Dis., decision filed June 8, 1975) *appeal docketed,* No. 14152, Utah Sup. Ct., June 19, 1975. The Utah state legislature is in the process of enacting supportive legislation providing for transfer of criminal cases brought before non-lawyer judges to the nearest or most convenient court presided over by a lawyer judge. H.B. No. 1, 1975 First Special Session.

In New Hampshire, a case challenging the constitutionality of incarceration by non-lawyer judges currently is pending before the state's supreme court. *Jenkins* v. *Canaan Municipal Court,* No. 7230 (Sup. Ct., filed July 16, 1975). In Wyoming, the authority of non-lawyer justices of the peace to conduct preliminary hearings in felony cases was recently upheld by the Wyoming Supreme Court. *Thomas*

v. *Justice Court of Washakie,* No. 4538 (Sup. Ct., decision filed July 14, 1975). But the court specifically did not reach the question of whether a non-lawyer justice of the peace could incarcerate, distinguishing the case on the grounds that the preliminary examination was a more informal and less complex proceeding than a trial. *Id.* at 6, 8.

The attack on non-lawyer judges is not limited to the courts. Recently, North Dakota's state legislature passed a resolution creating a proposed new judicial article for the state constitution. The proposed judicial article would unify the state's court system and require supreme court and district court judges to be lawyers. H. Concurrent Res. No. 3056, §94 (44th Leg. Ass., 1975). In North Carolina, a state constitutional amendment was proposed requiring that all judges be lawyers. S.B. 260 (Sess. 1975).

These developments strongly suggest that the professionalization of the judiciary is an area of urgent national concern. This court not only bears the prime responsibility for providing leadership in upgrading the quality of the judiciary, but it must provide specific, positive guidance in this area to the state. The rights of many individuals may be denied if the states are allowed to do nothing, or to move haphazardly, towards providing competent judges for criminal defendants who are faced with the possibility of imprisonment.

D. Providing A Lawyer Judge Whenever A Defendant Is Faced With The Possibility Of Incarceration Would Not Be Difficult To Implement.

A decision by this Court requiring a lawyer judge in every criminal case where a term of imprisonment may be imposed will not disrupt the orderly administration of justice

in the state court systems. The experience of California under the mandate of its supreme court decision in *Gordon* v. *Justice Court, supra,* indicates that it is possible to provide lawyer judges for criminal defendants facing the possibility of incarceration without disrupting the administration of justice. See Appendix, *supra.*

Even in sparsely populated rural areas, California now provides an attorney judge for all criminal defendants who face possible imprisonment and who choose to exercise their right to an attorney judge. The implementation of the *Gordon* decision did not even require the creation of new judgeships or the appointment of new personnel. Certification of incumbent attorney justice court judges proved sufficient to meet the requirements of *Gordon.* See Appendix, *supra.*

The experiences of Nebraska and Oklahoma also suggest that it is possible to provide lawyer judges even in states which have large areas with low population. Nebraska provides for circuit-riding lawyer judges supported by non-lawyer associate judges. The associate judges hear only routine, uncontested cases. See Appendix, *supra.* Oklahoma allows a non-lawyer to be certified as a Special Judge only when no lawyer candidate for the judgeship can be found. In all of Oklahoma, there is only one non-lawyer Special Judge. See Appendix, *supra.*

CONCLUSION

In large measure the quality of justice depends upon the quality of judges. It is now apparent that requiring a lawyer judge to preside over a trial where an accused faces the possibility of imprisonment does not disrupt the criminal justice process. Rather, it enhances the assurance of justice for the accused while improving the quality of judicial administration. For the reasons stated we respectfully submit that the judgment of the Court of Appeals of Kentucky in this case be reversed.

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APPENDIX

SURVEY OF STATES PROFESSIONALIZING THEIR JUDICIARY

Introduction

Based on preliminary research conducted by the American Judicature Society in 1974, the Society conducted a telephone survey during July 1975 of those states which are in the process of professionalizing their judiciary or which already have a completely professionalized judiciary. The Society interviewed state court administrators of nineteen states for this purpose.

ALABAMA

(Information acquired from Charles Cameron, Court Administrator)

Alabama recently passed an amendment to the state constitution which requires that all judges be lawyers, with the exception of probate court judges, who are essentially administrators and do not have the power to incarcerate. Ala. Const. art. 6, §§ 145, 146. All requirements as to judicial qualifications will become effective by January, 1977. Currently, Alabama has a total of 200 state court judges and 387 municipal court judges. Of these, 30 state court judges are non-lawyers. (There is no information on the number of municipal court judges who are non-lawyers.)

CALIFORNIA

(Information acquired from Eugene Kaster, Administrative Office of the Courts)

California has 1,165 judgeships; 66 of these positions are vacant and 109 are occupied by non-lawyer judges who are in the justice courts of 41 counties. The California Supreme Court decision in *Gordon* v. *Justice Court for Yuba Judicial District of Sutter County*, 12 Cal. 3d 323, 525 P. 2d 72, 115 Cal. Rptr. 632 (1974) held that whenever a criminal defendant is faced with the possibility of incarceration, he has a right to a lawyer judge. The California legislature responded to the decision with supportive legislation in the form of a transitional plan to operate the justice courts for a two-year period during which a comprehensive reorganization of the justice courts could be undertaken. Cal. Gov. Code §§ 71700-71704 (West 1970). The transitional plan authorized the Chief Justice of the California Supreme Court to certify any attorney judge of a justice court for five years as a circuit justice court judge if he agreed to give up his law practice. Cal. Gov. Code § 71702(a) (West 1970). This circuit justice court judge sits in his home county and others nearby when defendants exercise their right to an attorney judge. Cal. Gov. Code §§ 71702, 71704 (West 1970). The legislation also provides for the Judicial Council to make findings of necessity for a particular justice court district; a new judgeship is thereby created and the judge is appointed by the governor. Cal. Gov. Code §71700 (West 1970). This provision has not been utilized since the certification of incumbents has been found to be more efficient. The transitional plan has not been much more expensive to administer than the previous non-lawyer judge system. The only new expenses have been the salaries of the circuit justice

court judges and the justice court coordinator who organizes their schedules.[1] The California legislature is currently considering a proposed comprehensive plan to take the place of the transitional one.

The new system has not disrupted law enforcement. Police departments do not report any difficulty in obtaining search warrants or preliminary felony hearings, both areas formerly within the jurisdiction of the non-lawyer judge. All judges not in the justice courts in California are lawyers. Cal. Const. art. VI, § 15.

COLORADO

(Information acquired from Harry O. Lawson, Court Administrator)

In Colorado, all judges must be lawyers, except county court judges in counties of low population and municipal court judges. Colo. Const. art. VI, §§ 8, 11. Of the 107 county court judges, approximately 25 are non-lawyers; the non-lawyer judges handle approximately 3% of all county court cases. Of the 168 municipal court judges, 118 are non-lawyers. The non-lawyer judges are all part-time and handle primarily traffic violations.

The transition to a professionalized judiciary in Colorado took place over a period of three years after the constitutional amendment of 1962. The number of judicial personnel was reduced drastically; specifically, 250 justices of the peace were eliminated. Two judicial committees drew new district boundaries to place lawyer judges within each district. The trial *de novo* procedure for ap-

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[1] Total budget estimate for 1975-76: $1.5 million.

peal out of the lowest courts was abolished and the rate of appeals dropped by 50-60% thereafter. The new system did not disrupt law enforcement. Police departments report no difficulty in obtaining search warrants or preliminary felony hearings despite the reduction in the number of judicial personnel.

CONNECTICUT

(Information acquired from Justice John Cotter, Chief Court Administrator)

In 1961, Connecticut abolished its justices of the peace, town and city courts, thereby abolishing all non-lawyer judicial positions in Connecticut and replacing them with an all lawyer judge circuit court. Conn. Gen. Stat. Ann. § 51-47 (1960). All of Connecticut's 246 judges are lawyers, except probate court judges who are not required to be lawyers. Conn. Gen. Stat. Ann. § 45-6 (1960). However, probate court judges are essentially administrators who admit uncontested wills to probate and administer them. In the case of a will contest, there is always a transfer for trial *de novo* to the superior court. Conn. Gen. Stat. Ann. § 45-288 (1960); *McKinnon* v. *Burke*, 25 Conn. Supp. 285, 203 A.2d 85 (1964).

The transition to a fully professionalized judiciary was smooth and did not disrupt law enforcement. Police departments reported no difficulty in obtaining search warrants or preliminary felony hearings after the abolition of justices of the peace, town and city courts, since there are judges available 24 hours a day.

DISTRICT OF COLUMBIA

(Information acquired from Arnold M. Malech, Executive Officer, D.C. Courts)

All judges in the District of Columbia must be members of the District of Columbia Bar. D.C. Code Encycl. Ann. § 11-1501(b) (Supp., 1970).

HAWAII

(Information acquired from Lester E. Cingcade, Administrative Director of the Courts)

All judges in Hawaii are required by law to be attorneys. Haw. Const. art. V, §3.

ILLINOIS

(Information acquired from William Madden, Administrative Office of the Courts)

A constitutional amendment passed in 1970 made bar membership a requirement for all judicial offices including magistrates. Ill. Const. art. VI, §11. Prior to the constitutional amendments of 1964 (unifying the court system) and 1970 (requiring bar membership for judges), Illinois had more than 1800 judges, justices of the peace and police magistrates. Today, the state has only 665 judges and all but 12 are lawyers. The 12 non-lawyers are associate judges appointed by the circuit court judges under a "grandfather" clause in the 1970 constitution making it possible for former justices of the peace and police magistrates to serve as appointed associate judges. Ill. Const. art. VI, § 11. As of 1971, no one could become a judge in Illinois who was not a licensed attorney.

The transition to a fully professionalized judiciary has been smooth with no disruption of law enforcement despite the reduction in the number of judicial personnel. The state has adopted procedures to make judges accessible at all times to law enforcement officials by having a bond court with judges available 24 hours a day.

MAINE

(Information acquired from Charles Rodway, Administrative Assistant to the Chief Justice)

In 1961, Maine professionalized its judiciary by a statutory provision requiring all judges to be members of the state bar. Me. Rev. Stat. Ann. tit. 4, § 157 (1964). The transition to a fully professionalized judiciary was smooth and inexpensive; 20 full-time lawyer judges replaced 30 part-time non-lawyer judges with no disruption of law enforcement. Today, all of Maine's 56 judges are lawyers.

Under the all-lawyer judge system, the rate of appeals has decreased since the common practice had been to appeal all convictions from part-time non-attorney judge courts to full-time lawyer judge courts.

MARYLAND

(Information acquired from William H. Adkins, II, Director, Administrative Office of the Courts)

Maryland professionalized its judiciary by constitutional amendment in 1970 requiring all judges to be lawyers. Md. Const. art. IV, §2. Today, all 186 Maryland judges are lawyers, excluding those in the orphans' court which is the probate court of Maryland. Md. Const. art. IV, § 40. Of the 66 judges in the probate court, the majority are non-lawyers. However, probate court judges are primarily administrators and do not have power to incarcerate.

The transition to a fully professionalized judiciary was smooth with no disruption of law enforcement. The transition was also relatively inexpensive. Although it required an initial outlay of $10 million by the state, the unified, professionalized court system more than pays for itself; the state recovers a $2-4 million profit annually. Moreover, since the judiciary has been professionalized, the rate of appeals has dropped by approximately 50%.

MASSACHUSETTS

(Information acquired from Executive Secretary, Supreme Judicial Court, in response to mailed questionnaire - February 6, 1974)

By tradition, all judges in Massachusetts are attorneys although there are no statutory or constitutional requirements of bar membership for judges. The state has no non-lawyer judges.

MICHIGAN

(Information acquired from John Mayer, Office of the Court Administrator)

In 1963, Michigan began professionalizing its judiciary by abolishing the office of justice of the peace. Mich. Const. art. 6, § 26. Two hundred district court judges replaced more than 1000 justices of the peace. Today, all judges in Michigan must be members of the state bar. Mich. Const. art. 6, § 19 (supreme court, court of appeals, circuit court, probate court and other courts of record); Mich. Const. art. 6, § 20 (probate court); Mich. Comp. Laws Ann. § 728.3 (1968) (court of common pleas in Detroit); Mich. Comp. Laws Ann. § 600.8201 (1968) (district court).

Today, of Michigan's 485 judges, all but five are lawyers. The five non-lawyer judges are in the probate court by a "grandfather" clause in the 1963 state constitution. Mich. Const. art. 6, § 26. Their jurisdiction is more limited than that of lawyer probate court judges in that they may not be assigned as circuit court judges whereas lawyer probate court judges may. Mich. Const. art. 6, § 19.

The transition was smooth without disruption of law enforcement. The rate of appeals in the district court has been greatly reduced since the professionalization of the judiciary.

MINNESOTA

(Information acquired from Richard E. Klein, Court Administrator)

All judges in Minnesota are required to be members of the bar. Minn. Const. art. VI, § 7; Minn. Stat. Ann. § 487.03, Subdiv. 1 (1971). Today, of Minnesota's 211 judges, only five are non-lawyers; these five sit in the county probate court by virtue of a "grandfather" clause in the law. Minn. Stat. Ann. § 487.03 Subdiv. 1 (1971). The jurisdiction of non-lawyer judges, such as justices of the peace, consists only of taking pleas of guilty in cases of traffic violations and presiding over uncontested civil cases where less than $100 is at issue. Minn. Stat. Ann. § 487.04 (1971).

The transition to a professionalized judiciary was smooth and law enforcement was not disrupted.

NEBRASKA

(Information acquired from James E. Dunlevy, Court Administrator)

In 1973, Nebraska professionalized its judiciary during a major court reorganization. All judges must be members

of the state bar. Neb. Const. art. V, §21 (supreme court); Neb. Const. art. V. §27 (courts of general jurisdiction); Neb. Rev. Stat. § 43-233.02 (Supp., 1972) (juvenile courts); Neb. Rev. Stat. § 24-301 (Supp., 1972) (district judges); Neb. Rev. Stat § 24-505 (Supp., 1972) (county court judges).

Nebraska handles any problems due to shortage of lawyer judges with a "circuit-riding" plan. Each of the 93 county courts is staffed by an associate judge who need not be a lawyer. Neb. Rev. Stat. § 24-508 (Supp., 1972). The associate judges act primarily as clerks of court for 43 attorney judges who are organized in the state's 21 judicial districts. The associate judges handle only administrative matters and uncontested routine cases. Neb. Rev. Stat. § 24-511 (Supp., 1972).

The court reorganization and professionalization eliminated approximately 100 justices of the peace, 300 police court judges, and 93 county court judges, none of whom were attorneys. Although Nebraska now has only 197 judges, law enforcement has not been disrupted. The transition was smooth and the new "circuit-riding" system works well.

NEW JERSEY

(Information acquired from Judge A. J. Simpson, Jr., Acting Administrative Director of the Courts)

By law, all judges in New Jersey must be members of the bar. N.J. Const. art. 6, § 2, para. 6 (supreme court, superior court, and county district courts); N.J. Rev. Stat. § 2A-6-8.1 (1952) (juvenile and domestic courts); N.J. Rev. Stat. § 2A-8-7 (1952) (municipal court). Of 292 full-time judges and 398 part-time municipal court judges, all but 10 are lawyers. The 10 non-lawyer judges sit in the mu-

nicipal courts and are authorized by a "grandfather" clause in the law. N.J. Rev. Stat. § 2A-8-7 (1952).

While judges in the surrogate court are not required to be lawyers, these judges are essentially bonded, quasi-judicial officers who act as clerks of the probate court which is the county district court. N.J. Rev. Stat. § 2A-5-1 (1952). They are authorized only to admit wills to probate where the wills are routine and uncontested. N.J. Rev. Stat. § 2A-5-17 et seq. (1952).

The role of the remaining non-lawyer judges in the municipal courts is sharply limited. They may not handle preliminary felony hearings nor take a waiver of indictment and jury trial to try a case.

The transition to a fully professionalized judiciary was smooth and law enforcement was not disrupted in any way.

OHIO

(Information acquired from the Office of the Administrative Director of the Courts)

Ohio law requires all judges to be lawyers. Ohio Rev. Code Ann. § 2503.01 (Page 1953) (supreme court); Ohio Rev. Code Ann. § 2501.02 (Page 1953) (court of appeals); Ohio Rev. Code Ann. § 2101.02 (Page 1953) (probate court); Ohio Rev. Code Ann. § 2151.07 (Page 1953) (juvenile court); Ohio Rev. Code Ann. § 2301.01 (Page 1953) (court of common pleas); Ohio Rev. Code Ann. § 1901.06 (Page 1968) (municipal court); Ohio Rev. Code Ann. § 1907.051 (Page 1968) (county courts). Of Ohio's 594 judges, only three are non-lawyers. The three non-lawyers sit in the county court and are authorized by a "grandfather" clause in the law. Ohio Rev. Code Ann. § 1907.051 (Page 1968).

Although there are approximately 600 mayor's courts which do not have a bar membership requirement for judicial eligibility, mayor's courts cannot incarcerate since they have jurisdiction over traffic violations only. Ohio Rev. Code Ann. § 1905.01 et seq. (Page 1968); Ohio Rev. Code Ann. § 1907.031 (Page 1968).

The transition to a fully professionalized judiciary was smooth, since it took place over a period of 38 years. There was no disruption of law enforcement.

OKLAHOMA

(Information acquired from Marian Opala, Administrative Director of the Courts)

Oklahoma law requires bar membership for eligibility for a judgeship. Okla. Const. art. 7, § 2 (supreme court); Okla. Const. art. 7, § 3 (court of criminal appeals); Okla. Stat. Ann. tit. 20, § 30.9 (1962) (intermediate court of appeals); Okla. Const. art. 7, § 8(g) (district court). Oklahoma law provides specially for any occasion when a lawyer candidate for a district court judgeship cannot be found that a non-lawyer may be appointed as a Special Judge. Okla. Const. art 7, § 8(h). The criminal jurisdiction of the non-lawyer Special Judge is limited to misdemeanors punishable by small fines and/or incarceration up to 30 days unless the Special Judge has the written consent of all the parties to hear the case. 20 O.S. 1972, § 123 (1974).

In spite of the fact that much of Oklahoma is sparsely populated, only one of Oklahoma's 203 judges is a non-lawyer judge under the Special Judge provision. Okla. Const. art. 7, § 8(h).

The professionalization and unification of Oklahoma's court system replaced 240 non-lawyer judges in courts of

limited jurisdiction with 44 lawyer magistrates. In spite of the reduction in personnel, the transition was smooth and there was no disruption of law enforcement.

RHODE ISLAND

(Information acquired from the Office of the Court Administrator)

Of Rhode Island's 36 judges, all are lawyers. By tradition, all judges are lawyers.

SOUTH DAKOTA

(Information acquired from Ellis Pettigrew, State Court Administrator)

South Dakota is currently in the process of professionalizing its judiciary pursuant to the rule-making power of the supreme court. S.D. Const. art. V, § 12. Currently, South Dakota has 108 non-lawyer judges all of whom sit in courts of limited jurisdiction. The transition will be carried out on a circuit by circuit basis over a period of three years. At the moment, only one judicial circuit has been completely professionalized.

VIRGINIA

(Information acquired from the Office of the Executive Secretary, Supreme Court of Appeals)

Recent changes in Virginia law require that all judges be lawyers. Va. Code Ann. § 16.1-69.15 (Supp., 1975). Of Virginia's 272 judges, only 4 are non-lawyers. These 4 judges sit in the district court and juvenile court as part-time judges by virtue of a "grandfather" clause in the law. Va. Code Ann. § 16.1-69.9 (Supp., 1975).

The transition to a fully professionalized judiciary has been smooth. Law enforcement has not been disrupted by the transition because Virginia's judges are assisted by approximately 360 committing magistrates who are not required to be lawyers. Va. Code Ann. § 19.1-378 (Supp., 1975); Va. Code Ann. § 19.1-380 (Supp., 1975); Va. Code Ann. § 39.1-15 (1970).

Supreme Court, U. S.
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AUG 7 1975
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No. 74-1409

LONNIE NORTH,

Appellant,

v.

C. B. RUSSELL; NATHANIEL "TRAP" HELTON, Jailer of Harlan County,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC., AMICUS CURIAE

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Interest of Amicus

The American Civil Liberties Union Foundation, Inc. is a non-profit, non-

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1. This brief is filed with consent of the parties. The letters of consent have been filed with the Clerk of the Court.

partisan organization affiliated with the American Civil Liberties Union. Its sole purpose is the defense of the Bill of Rights. Amicus has always placed special emphasis on protection of the rights of persons accused with crime. Attorneys affiliated with the American Civil Liberties Union Foundation, Inc. presently represent the plaintiffs in Frierson v. West, Civ. No. 74-1074, D.S.C., litigation alleging the unconstitutionality of South Carolina's system of lay magistrates.[1] Amicus contends that in criminal cases trial before a lay judge is inherently prejudicial and deprives defendants of due process and equal protection guaranteed by the fourteenth amendment of the Constitution of the United States.

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1. The civil complaint was dismissed on May 15, 1975, by a three-judge panel without reaching the merits on grounds that plaintiffs lacked standing and failed to show actual prejudice. Slip opinion at p. 13. Notice of appeal was filed on June 16, 1975. South Carolina's magistrates are similar to Kentucky's police judges, except there is no requirement that any magistrates, including those of larger cities, have any particular legal qualifications, training or level of legal knowledge. Cf. Kentucky Revised Statutes Sections 26.140 and 26.150(1), and Kentucky Constitution Section 130.

In addition to limited civil juris-

[footnote continued to next page]

[footnote continued from preceding page]

diction, magistrates have criminal jurisdiction over "all offenses which may be subject to the penalties of either fine or forfeiture not exceeding one hundred dollars or imprisonment in the jail or workhouse not exceeding thirty days and may impose any sentence within those limits, singly or in the alternative." Section 43-63, Code of Laws of South Carolina, 1962, as amended. Magistrates also have the responsibility of issuing warrants, making or authorizing arrests, conducting preliminary hearings, setting bail, issuing subpoenae, supervising jury selection, conducting jury and non-jury trials, making an election of charges, taking testimony de bene esse, compelling attendance of witnesses and the giving of testimony, ruling on motions to change venue, issuing warrants to break open doors of gambling rooms, endorsing warrants issued by other magistrates, disposing of persons arrested without warrants, and punishing by contempt. Sections 43-114, 116, 131, 132, 133, 134, 201, 202, 211-17, 221, 222, 231 and 241, Code of Laws of South Carolina, 1962, as amended.

Appeal from conviction in the magistrates court is not de novo but is upon a return prepared by the magistrate himself. Section 7-104, Code of Laws of South Carolina, 1962, as amended.

ARGUMENT

The case sub judice is not unique but exemplifies what is constant in a system of lay judges, as the following comparisons between the records in this case and Frierson v. West, supra, demonstrate:

(a) Gross lack of knowledge of substantive and procedural provisions of criminal law. See App. at 18-24. As appears from the record in Frierson v. West, supra, the level of understanding of magistrates of the law, legal principles and procedure is, with all charity, often nonexistent or so minimal as to approach the absurd. See excerpted deposition testimony of Magistrate Robert McLendon, attached as an addendum hereto.[1]

1. Magistrate McLendon was unaware of procedures for jury trials. Deposition of Robert McLendon at p. 116 (hereinafter "McLendon at ___.") He was unaware of the purpose of bail, a defendant's entitlement to it, the factors to be considered or the procedures in setting bail. McLendon at 117-18. He did not know what his duties were in connection with appeals from his court, or whether he was required to prepare a record of trial. McLendon at 120. He did not know the circumstances under which an individual is entitled to a preliminary hearing, nor the procedures to be followed in conducting such a hearing. McLendon at 121-22. He was not familiar with the concept of probable cause

[footnote continued to next page]

[footnote continued from preceding page] and had never refused to issue an arrest or search warrant. McLendon at 121-22. He was not familiar with the rules of evidence or the concept of judicial notice. McLendon at 122. He had heard of the hearsay rule, but was unaware of the doctrine of exceptions to hearsay such as declarations against interest or the business records rule. McLendon at 122-23. He was unfamiliar with the concept of impeaching a witness's testimony. McLendon at 123. He stated that a plea of guilty made under the influence of drugs or alcohol could never be withdrawn. McLendon at 124. He was not familiar with the exclusionary rule or whether evidence seized in violation of the fourth amendment must not be allowed into evidence. McLendon at 124. He was not aware of any responsibility he had as a magistrate to determine the voluntariness of a confession before letting it go to a jury. McLendon at 125. He was unaware of the basis of the magistrate's jurisdiction. McLendon at 126. He was not familiar with the concept of statutes being defective because of overbreadth of being void for vagueness. McLendon at 126. He was unfamiliar with the concept of constitutionality and denied that as a magistrate he had the authority to declare a law of the State of South Carolina unconstitutional. McLendon at 126. He was unfamiliar with the concept of reasonable doubt in connection with trials. McLendon at 128.

(b) Lack of legal training. See App. at 15-6. According to Thames and Dreher, Thames-Dreher Research and Design Study, The South Carolina Magisterial System, Judicial Education, University of South Carolina, January 2, 1973, Table 4, p. 22, the majority of South Carolina's magistrates never attended school beyond the 12th grade.[1] Moreover, magistrates receive no formal training prior to taking office involving their judicial duties nor are there any satisfactory provisions made for their on-the-job education. Addendum at 1a.[2] A majority of magistrates themselves acknowledge that they "need" training in learning proper operation of a courtroom, in proper conduct of a trial and in developing bibliographical skills. Thames-Dreher, supra, at p. 14. Another 45% felt that such training "wouldn't hurt." Ibid.

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1. Of the state's 328 magistrates only 16 have law degrees and are members of the bar. Four others have attended law school but have never been admitted to practice. Deposition of Neal Forney, Director of the Department of Judicial Education of the University of South Carolina at pp. 33-4 , Exhibit 3 (hereinafter "Forney at ___ ").

2. The Department of Judicial Education of the University of South Carolina began in 1971 holding 3 to 4 day "schools" for magistrates, but attendance is voluntary and approximately half of the magistrates never attend. Forney at 80, Exhibits 6 and 7.

(c) Lack of access to and ability to use legal material. See App. at 20-3. The library of a South Carolina magistrate may consist of a set of the Code of Laws of South Carolina and nothing else. Addendum at 1a-2a. Neither of the two magistrates deposed in Frierson v. West, supra, had ever read an opinion of any federal court or state court of South Carolina. McLendon at 113-14 and Deposition of Archie H. Chandler, Sr. at 20-1, 28.[1]

(d) Reliance upon non-judicial advice. See App. at 16-7, 30-3. Because of their unfamiliarity with applicable law, their lack of access to research material and their ignorance of bibliographical methods, lay judges rely disproportionately upon advice from non-judicial sources in resolving matters that come before them. Addendum at 2a-3a.

(e) Identification with law enforcement. See App. at 17. One of the findings of the Thames-Dreher study was that lay judges tend to identify more closely with law enforcement and the prosecution than judicial administration, and that the tendency is encouraged by police officers "by

---

1. According to Forney: "It takes several years for it [reform and changes in the law] to filter through the Attorney General's and the Governor's and other offices into the magistrate court." Forney at 161.

favoring" prosecution prone magistrates.[1]

> This problem will require extensive treatment in any educational effort and suggest the necessity of coordinating with police officer training programs. The public will not view the magistrate as a judge until the magistrate and officer do.
> Thames-Dreher at p. 11.

(e) Part time judges. See App. at 15. The great majority of magistrates in South Carolina are only part time judges. Forney at 40. Because the state pays magistrates so little (58% make less than $3,000 a year)[2], they take other jobs such as farming, selling insurance, pumping gas or operating a fish camp. Thames-Dreher at p. 20. The low salary accounts in some measure for the high turn-over rate of magistrates in South Carolina, from 50 to 70 a year. Forney at 36-7. As the Thames-Dreher study observes: "It is a job not calculated

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1. Also see, Civil Liberties, "Justice Under A Willow Tree," April, 1975, p. 4: "A black magistrate in Dorchester County, the first in the county's history, reports that after she dismissed speeding charges against a black couple, state highway patrolmen have failed to refer any case to her for trial." (Emphasis in original).

2. Thames-Dreher at p. 27.

to attract the highest calibre applicant."[1]

Lay judges, despite their apparent inability to perform judicial functions, have a profound impact upon the administration of criminal justice.[2] Whatever the historical justification for lay judges, their use for the trial of criminal cases can no longer be defended given the present state of communication and transportation in the United States and the presence of legally trained persons.[3]

---

1. Ibid., at p. 12. According to Forney: "We get a cheap man; we get him dirt cheap...a teenage boy working at the mill gets paid more than nearly half the magistrates in the state. A dishwasher at the local cafe makes more than three-fourths of the magistrates in the state." Forney at 141.

2. It is estimated "that eighty-five percent of all the criminal justice in the state [of South Carolina] is administered in the magistrate court and never goes beyond that level." Forney at 105. There is, as noted earlier, no right to a de novo trial from conviction in magistrate's court. Where there is an appeal but some disagreement as to the facts exists, the reviewing court is "bound by the Return of the magistrate before whom the respondent was tried." State v. Sarvis, ___ S.C. ___, ___S.E.2d ___, Op. No. 20066, July 17, 1975.

3. In South Carolina, for example, there are 3,227 persons admitted to the bar, and there is a local bar in every county in the State. Forney at 32 and 1974 Directory of Members, South Carolina State Bar, South Carolina Bar Association, September 1, 1973.

CONCLUSION

The lay judge system is inherently prejudicial. It creates both the appearance and probability of unfairness. Offutt v. United States, 348 U.S. 11, 14 (1954); Estes v. Texas, 381 U.S. 532, 544-45 (1965), and In re Murchison, 349 U.S. 133, 136 (1955).

Decisions of this Court, including Argersinger v. Hamlin, 407 U.S. 25 (1972), extending the right of counsel to all persons exposed to sentences of confinement, Shadwick v. City of Tampa, 405 U.S. 345 (1972), concluding that judicial officers must be capable of resolving legal issues, and Jackson v. Denno, 378 U.S. 368 (1964), recognizing that lay persons are unable to make certain decisions involving the application of constitutional principles, require the reversal of appellant North's conviction and the invalidation of Kentucky's lay judge system.[1]

---

1. Amicus recognizes the legal rule of flexibility in securing fundamental trial rights. See e.g., Mayer v. City of Chicago, 404 U.S. 189 (1971) and the concurring opinion of Mr. Justice Powell in Argersinger v. Hamlin, supra, at 44. However, Amicus urges this Court to adopt a rule embodying clear standards in implementing the concept of minimum judicial capacity. Anything different would be troublesome

[footnote continued to next page]

Respectfully submitted,

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ADDENDUM

[footnote continued from preceding page]

practically and difficult to administer as a constitutional standard. In the absence of a clear requirement that judges be admitted to the bar or posses equivalent training, litigants would be forced to challenge the competency of the very people who, if they challenged unsuccessfully, would try them. It is predictable that every trial before a lay judge would involve two trials, one upon the merits and the other questioning the capacity of the court.

Excerpted deposition testimony of Magistrate Robert McLendon, October 15, 1974

Q: Were you given any instructions when you were appointed Magistrate as to how to perform your duties?

A: No, sir.

Q: Did you understand what your duties were prior to your appointment?

A: No, sir, not exactly. [p. 109]

. . .

Q: Do you presently have an understanding of what your duties as a Magistrate are?

A: Well, not really, no. [Ibid]

. . .

Q: What books do you have...that deal with the duties of Magistrate?

A: I got a stack of volume books from the courthouse when I got the job, little red books.

Q: What books are those sir, do you know the names of them?

A: No, sir.

Q: Is that a Code of Laws of South Carolina?

A: Yes, sir, that's right.

Q: Do you have any other books other than those?

A: No, sir.

Q: That pertain to your duties as magistrate?

A: No, sir.

Q: Tell me what your understanding of the Code of Laws is, what is contained in the Code of Laws, as you understand?

A: Well I never have done any reading in it.

Q: You never have had occasion to refer to it?

A: No, sir. [p. 110]

. . .

Q: Have you ever read an opinion of either the Federal District [Court], Court of Appeals or the Supreme Court?

A: No, sir.

Q: Have you ever read a decision of the Supreme Court of South Carolina?

A: No, sir. [pp. 113-14]

Q: What would you do if someone were to request a trial by jury?

A: I would come to Mr. George Stuckey [the county attorney] and find out

what I had to do. [p. 116]

. . .

Q: Do you know the procedure for setting bail?

A: No, sir, not really I don't. [p.117]

. . .

Q: What is the purpose of bail?

A: It is for violation and a good reminder not to do it again. [Ibid]

. . .

Q: Do you know the facts that you would have to take into consideration in setting bail?

A: No, sir.

Q: Do you know whether or not a person has a right to have a bail set?

A: Whether they have a right to have it set?

Q: Yes.

A: No, sir, I don't. [p. 118]

Q: Let's assume that someone has a jury trial to try before you and this person is convicted, is there a procedure as you understand it through which he can appeal his conviction?

A: There would be.

Q: What is that?

A: I don't know exactly when.

Q: Do you know what duties you would have in connection with that appeal?

A: No, sir.

Q: You don't know for example whether or not you would have to prepare a synopsis of the trial?

A: No, I don't. [p. 120]

. . .

Q: Under what circumstances would an individual be entitled to a preliminary hearing?

A: I don't know how to explain it.

Q: Is that because you don't know the answer to the question?

A: I would think so. [p. 121]

. . .

Q: Do you know whether or not a defendant is entitled to cross examine the State's witnesses at a preliminary hearing?

A: I don't know it but I wouldn't think so.

Q: Do you know whether or not he has a right to put up witnesses or his own?

A: No, sir, I don't.

Q: Are you familiar with the concept of probable cause, in connection with preliminary hearings?

A: No, sir.

Q: Or in connection with the issuance of search warrants, or arrest warrants?

A: No, sir. [pp. 121-22]

. . .

Q: Have you ever refused to issue an arrest or search warrant?

A: No, sir.

Q: Are you familiar with the rules of evidence which govern the admissibility of evidence at trials?

A: No, sir.

Q: Have you ever heard or are you familiar with the concept of hearsay evidence?

A: No, sir.

Q: Are you familiar with the concept of judicial notice?

A: No, sir. But now I do know the hearsay

stuff, you can't pay attention to too much hearsay. Just like you could come in and tell me that Mr. Stuckey here hit you side the head and wanted to take out a warrant or something, you didn't have any scars, or somebody else come in and tell me that he had, that would be hearsay.

Q: Let's assume hypothetically that I did get a warrant, for Mr. Stuckey, an arrest warrant and the case was tried and he was the defendant, and I took the stand and said he hit me on the head, would that be hearsay, or if I said Mr. Stuckey said he hit me on the head?

A: If you said Mr. Stuckey said, that would be hearsay.

Q: Are there any exceptions, are you familiar or aware of the rule of exceptions to hearsay doctrine?

A: No, sir.

Q: Are you familiar with the concept of declaration against interest, in the matter of evidence?

A: No, sir.

Q: Are you familiar with the concept of impeaching a witness?

A: No, sir.

Q: Impeaching a witness's testimony?

A: No, sir.

Q: Do you know whether or not business records are admissible in evidence in your court?

A: Business records?

Q: Yes, sir.

A: No, sir, I don't.

Q: Are you familiar with the concept of business records as they relate to evidence?

A: No, sir.

Q: Can anyone who has entered a plea of guilty in your court ever withdraw that plea?

A: No, sir.

Q: What if they claim the next day for example they were under the influence of drugs and alcohol, do you think that could form a basis for withdrawing a plea?

A: No, sir.

Mr. Stuckey: No sir, he can't try a man under the influence of drugs.

Q: (By Mr. McDonald). If you were trying a man under the influence of drugs and he entered a plea and said later that he wanted to withdraw it, could he withdraw his plea under

those circumstances?

A: No, sir.

Q: Are you familiar with the exclusionary rule, does that phrase mean anything to you?

A: No, sir.

Q: Do you know whether or not certain evidence which may have some evidentiary value, do you know whether or not under any circumstances that evidence must not be allowed into evidence because of some Constitutional violation committed by the arresting officers?

A: No, sir, I don't.

Q: Are confessions admissible in evidence, I mean hypothetically. . . if a policeman were to say, I arrested John Doe and he said that he did thus and so, would that testimony be admissible into evidence?

A: Well, after I talked to John Doe it would be.

Q: What would you do to determine whether or not you were going to allow it?

A: I would just talk to John and ask him if it was true.

Q: Are you aware that you have any responsibility as a Magistrate to

determine the voluntariness of a confession before letting it go to the jury?

A: No, sir. [pp. 122-125]

Q: What [cases] can you try?

A: Where the bond is not over a hundred dollars.

Q: And does the penalty for crime have anything to do with your ability to try a case?

A: No, sir.

Q: Are you familiar with the concepts of statutes being defective because they are overly broad.

A: No, sir.

Q: What about the concept of a statute being void because of vagueness?

A: No, sir.

Q: As a Magistrate do you have the authority to declare a law of the State of South Carolina unconstitutional?

A: No, sir. [p. 126]

. . .

Q: Are you familiar with the concept of unconstitutionality or constitutionality?

A: No, sir. [p. 127]

. . .

Q: Are you familiar with the concept of reasonable doubt in connection with a jury trial?

A: Well I would have to say no to it, because I don't really know. [p. 128]

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BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICUS CURIAE

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In The

Supreme Court of the United States

October Term, 1974

No. 74-1409

LONNIE NORTH,

Appellant,

vs.

C. B. RUSSELL AND NATHANIEL "TRAP" HELTON, JAILER OF HARLAN COUNTY,

Appellees.

On Appeal From The Court Of Appeals Of Kentucky

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The National Legal Aid and Defender Association (NLADA) is a not-for-profit corporation whose primary purpose is to assist in providing effective legal services for the poor. Its members include the great majority of defender offices, coordinated assigned counsel systems, and legal aid societies in the United States. NLADA also has 4,000 individual members, most of whom are practicing attorneys who represent indigent persons in criminal cases.

The fact that lay judges often preside in Kentucky police courts and in the lower courts of over 30 other states, causes the National Legal Aid and Defender Association to fear that this practice has and will result in inferior justice for the poor man, who is the principal litigant in those courts. In view of the direct importance of this case to attorneys serving the indigent accused throughout the United States, NLADA prays that this Honorable Court will grant the relief requested by the Appellant.

OPINION BELOW

The decision of the Court of Appeals of Kentucky, No. 74-723 was rendered March 21, 1975 and is as yet unreported (..... SW 2d .....)

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

An appeal was filed in this court on May 9, 1975 and probable jurisdiction was noted on June 23, 1975.

QUESTION PRESENTED

In a state where most defendants are brought before attorney judges, does allowing lay judges to try cases that affect the liberty of the accused constitute a denial of due process of law and equal protection in violation of the Fourteenth Amendment and a de facto deprivation of the right to counsel as embodied in the Sixth Amendment to the U.S. Constitution?

STATEMENT OF CASE

The National Legal Aid and Defender Association adopts Appellant's Statement.

SUMMARY OF THE ARGUMENT

The practice, of allowing lay judges to try cases that affect the liberty of the accused, violates the constitutional rights of those against whom, by an accident of geography, a complaint is filed in districts where a lay judge is sitting and is contrary to public policy. The unfamiliarity of lay judges with criminal law and procedure necessarily results in such a lack of adherence to the legal precedents which are applied in other courts that the accused are deprived of due process of the laws and equal protection as required by the Fourteenth Amendment to the U.S. Constitution. In addition, the barrier to defense counsel's communication with an untrained judge as to the rules and legal nuances governing the defendant's rights, results in a de facto deprivation of the Sixth Amendment right to counsel as applicable to the States by incorporation into the Fourteenth Amendment. Although large numbers of persons each year receive their first impressions of the Criminal Justice System in courts where non-lawyer judges preside, these courts, by and large, fail to meet professional standards of criminal law and procedure. A first step in upgrading the lower courts must be to staff them with professionally trained personnel. Finally, the development of modern means of transportation and communication and the availability of sufficient numbers of professionally trained personnel, coupled with the current trend away from lay judge courts, should result in the discarding of an antiquated system which was utilized as an expedient to meet Seventeenth Century, not Twentieth Century conditions.

ARGUMENT

I.

THE EXERCISE OF CRIMINAL JURISDICTION BY LAY JUDGES IN KENTUCKY RURAL AREAS RESULTS IN A DENIAL OF EQUAL PROTECTION IN VIOLATION OF THE FOURTEENTH AMENDMENT.

The only courts in Kentucky having lay judges are those in cities with a population of 20,000 or less, i.e. the rural areas. (3rd-6th class cities, K.R.S. 26.140, 26.150, 26.170, 26.190, 26.200 and Ky. Const., Sec. 156). This results in a denial of equal protection to criminal defendants who, due to an accident of geography, happen to be charged with crime in a rural district. The U.S. Supreme Court, viewing geographical discrimination as applied to the question of reapportionment, noted that, "The concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged." *Reynolds v. Sims*, 377 U.S. 533 (1964). (Also see *Avery v. Midland County*, 390 U.S. 474 (1968) and *Moore v. Ogilvie*, 394 U.S. 814 (1969)). This principle was recently applied in *James v. Strange*, 407 U.S. 128 (1972) where the U.S. Supreme Court struck down a Kansas statute requiring recoupment of counsel fees from indigent defendants. In that case, the Court reasoned that the statute constituted a denial of equal protection because indigent criminal defendants were not treated equally with other Kansas judgment debtors. Again, the question of uniform treatment of persons standing in the same relation to governmental action was discussed in *Furman v. Georgia*, 408 U.S. 238 (1972). In voting to abolish the death penalty, Justices Douglas, Stewart, and Marshall argued that the penalty was unconstitutional because it usually fell upon the poor, the ignorant, the underprivileged, and members of minority groups.

As the Court noted in *Reynolds v. Sims*, supra, "A citizen, a qualified voter, is no more or less so because he lives in the city or on the farm." The concept enunciated in that case applies to a citizen a fortiori where it is his liberty rather than his vote that is at stake. Surely geography should play no greater roll in impeding justice for citizens appearing before lay judge courts than it does for citizens appearing at the polling place.

II.

THE PRACTICE OF ALLOWING LAY JUDGES TO PRESIDE OVER CRIMINAL TRIALS RENDERS THE SIXTH AMENDMENT RIGHT TO COUNSEL NUGATORY AND CONSTITUTES A VIOLATION OF DUE PROCESS OF LAW.

In *Gideon v. Wainwright*, 372 U.S. 342 (1963), and its companion case, *Douglas v. California*, 372 U.S. 353 (1963), the U.S. Supreme Court held that the Sixth Amendment right to the assistance of counsel was applicable to the state by incorporation into the Fourteenth Amendment. Lay judges in Kentucky exercise criminal jurisdiction over misdemeanor trials involving up to a $500 fine or one year imprisonment, hold preliminary examinations in felony cases, and issue warrants. (See Appendix to this brief. A. 12a). The U.S. Supreme Court has held that a defendant has a right to counsel in state courts at preliminary examinations in *Coleman v. Alabama*, 399 U.S. 1 (1970). In 1972, the Court also held that the right to counsel at trials extended to all indigent criminally accused facing a jail sentence. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

However, the right to counsel is rendered illusory where counsel must argue before a judge who is not adequately trained in the law. If a judge is not able to rely

on his own knowledge of the legal merit of counsel's argument, he is apt to trust the counsel of the lawyer that he is most familiar with, as he lacks an independent standard by which to judge.

A judge who has been a lawyer is used to reading the advance sheets containing appellate and U.S. Supreme Court cases, as well as law review articles. A layman is not likely to be learned in such complex matters as the rules of evidence. The difficulty of the subject is nowhere better exemplified than in *California v. Green*, 399 U.S. 149 (1970) where the U.S. Supreme Court, reversing the California Supreme Court, held that admission of damaging statements made at a preliminary hearing did not violate the confrontation clause of the United States Constitution. It would be unrealistic to expect a lay judge who does not read current cases to rule correctly upon an issue on which even the California Supreme Court and the U.S. Supreme Court disagree.

In a 1972 study of the issue: "Lay Judges in the German Criminal Courts" by Professors Gerhard Casper and Hans Zeisel (1 J. Legal Studies, University of Chicago Law School, 135 (1972)), the authors discussed the differences in results between the handling of cases by lay judges and professional judges in Germany. With regard to representation, it was pointed out that, "As a rule, defendants must appear at trial with counsel. The exceptions are minor violations tried by the Schofengericht, where 15 per cent of the defendants were allowed to appear without counsel. Except in the Schwargericht, the majority of defendants appear with appointed counsel." Furthermore, the majority of judges rated defense counsel and prosecutor as equally competent.

The fact that the defendants were represented by competent counsel, however, did not alter the fact that the lay judges (who, in Germany, sit alongside professional judges in criminal trials) frequently view cases differently from the professional judges. The results of the study showed that the majority of cases where lay judges disagreed with professionals regarding guilt, involved evaluation of the evidence. The study found that professional judges applied stricter standards in evaluating the evidence than lay judges. However, lay judges were prepared to overcome the ambiguity of evidence in order to convict in some cases.

In cases involving sexual crimes, the study found that the lay judges tended in the direction of conviction, while the professional judges favored acquittal. This resulted from their view of the nature of the charge rather than the evidence.

Where consumer and credit fraud was concerned, the lay judges tended to acquit on the grounds that the alleged behavior was quite common in business circles. In these cases, the lay judges had misjudged the borderline between morally doubtful behavior and illegal behavior.

One interesting conclusion drawn was that lay judges tended to rely on professional judges because of their belief that the professional judges were experts. Taking this reasoning one step further, the lay judge in our system would be prone to rely on the judgment of the prosecutor or defense counsel, thinking that such a person would have a certain expertise, as was demonstrated in the record here, where Judge Russell relied on the city attorney—in effect, the prosecution for all legal advice. (Litigant's Appendix, A. 32, 37, and 52) The reliance of lay judges on the prosecutor for legal guidance has been expressly approved in one jurisdiction where in a manual for lay judges in the State of Utah, the following advice appears at Page 14:

> There will no doubt be many occasions, however, when the answer to his problem cannot be found in this book. In such case it is recommended that the justice get in touch with the county attorney of his county who is the legal advisor of the county's precinct officers.[1]

Thus, the presence of defense counsel in court, his presentation of evidence, and his argument about the legal standards is apt to fall upon deaf ears where the judge lacks an independent standard to apply and relies upon the advice of a prosecutor who has had long experience or is otherwise known to the judge. Since arguments based upon recent U.S. Supreme Court cases and areas of constitutional guarantees of due process argued by defense counsel may not be accorded to the defendant.

A misdemeanor triable by Kentucky Statutes before lay judges may raise issues of statutory interpretation, the relevance and significance of case precedents, questions of federalism and the applicability of Kentucky Court of Appeals decisions on federal Constitutional questions. Kentucky law prohibits the practice of law by one not admitted to the bar (30.010 KRS), yet the Commonwealth permits persons not qualified to be lawyers to serve as judges. What other learned profession, would elevate laymen to positions where they

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[1] Manual for Justices of the Peace in the State of Utah (1956).

would render judgments in complex professional matters affecting the public welfare, especially here involving judgments of conviction, resulting in loss of liberty?

Perhaps the practice could once have been defended by a view that minor crimes necessarily involve only simple legal issues. That view is no longer supportable in fact. The Supreme Court spoke to this point in *Argersinger v. Hamlin*, 407 U.S. 25, 33.

> We are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more . . .

Argersinger holds that due process requires appointment of counsel for an indigent defendant, absent knowing and intelligent waiver, whenever the defendant faces the possibility of a sentence of imprisonment. The Court's holding compels a parallel conclusion, that due process requires trial before a law trained judge in similar cases, since without a judge competent to rule on the legal issue in his case, the defendant's right to counsel will be rendered ineffective in any case which involves substantial issues of law. (Moreover, we fear, that this court's decision in *Argersinger*, supra, is not being implemented by lay judges for they do not possess the legal knowledge and expertise to exercise the discretion to appoint required counsel.).

III.

THE LAY JUSTICE SYSTEM IS FRAUGHT WITH ARBITRARY JUSTICE RESULTING IN A DENIAL OF DUE PROCESS.

The right to a fair trial is protected by the due process clause of the Fourteenth Amendment. Although the Fourteenth Amendment does not require that a trial be free from error, it does guarantee against arbitrary action. Differences in the procedures of the various states are subject to the test of fundamental fairness. The lay justice system is so fraught with danger that it is likely to result in arbitrary action. Lay judges in Kentucky have jurisdiction over many complex matters that directly affect the liberty of the accused. Their jurisdiction results in a denial of due process of law that cannot be remedied by according the accused the right to appeal. Moreover, no showing of prejudice is necessary to invalidate a procedure that results in a denial of due process.

The U.S. Supreme Court has held that *all* defendants are entitled to a fair trial (*Adamson v. California*, 332 U.S. 46, reh. den. 332 U.S. 784 (1947); *Tumey v. Ohio*, 273 U.S. 510 (1927)). While the Fourteenth Amendment is not a guaranty that a trial shall be devoid of error, if the error is gross and obvious, coming close to the boundary of arbitrary action, there is a violation of due process, (*Roberts v. New York City*, 295 U.S. 264 (1934)). However, due process does require that differences in criminal procedures in the several states should be subject to the requirements of fundamental fairness implicit in the concept of ordered liberty *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

No matter how well-meaning a lay judge may be, there are compelling reasons why he should not be permitted to perform judicial functions in proceedings which affect the liberty of the accused. The preliminary examination at which a judge decides the important question of whether or not there is probable cause to detain the defendant has been held to be a "critical stage" of the prosecution (*Coleman v. Alabama*, 399 U.S. 1 (1970)). It is at this stage that the judge will determine whether to bind the accused over to the grand jury or to set him free.

If the judge should find probable cause to detain the accused person, his discretion extends to the question of whether to admit him to bail or commit him to jail. As Justice Jackson, concurring in *Stack v. Boyle*, noted, "The first fixing of bail . . . is a serious exercise of judicial discretion." 342 U.S. 1, 11 (1951). The result of this decision may affect the ability of the accused to assist in the preparation of his defense. Studies have shown that defendants who have been released on bail pending their trial have a significantly greater chance of being found innocent (Foote, "Compelling Appearance in Court: Administration of Bail in Philadelphia," 102 U. Pa. L. Rev. 1031 (1954); Foote, "Foreword: Comment on the New York Bail Study", 106 U. Pa. L. Rev. 685 (1958); Note, "A Study of the Administration of Bail in New York City", Ibid., 693; Kamin, "Bail Administration in Illinois", 53 Ill. B. J. 674 (1965); Rankin, "The Effects of Pre-Trial Detention," 39 N.Y. U. L. Rev. 641 (1964))

The issuance of search and arrest warrants is another delicate task which lay judges are empowered to perform. (Kentucky Rules of Criminal Procedure 13.10 and 1.06) It involves a constitutional safeguard against unreasonable invasion of the home and restraint of personal liberty. Whereas lay judges tend to apply "common sense," the question of whether an affidavit states sufficient facts to support the issuance of search or arrest warrants has troubled the judges of the highest court of our land. (See *Aguilar v. Texas*, 378 U.S. 108 (1964), *Giordenello v. United States*, 357 U.S. 480 (1958); *Draper v. United States*, 358 U.S. 307 (1959); *Beck v. Ohio*, 279 U.S. 89 (1964).

To date, the U.S. Supreme Court has not passed upon the question of the constitutionality of the practice of allowing lay judges to issue warrants. In the case of *Shadwick v. City of Tampa*, 407 U.S. 345, (1972), this Court did touch peripherally on the issue. However, the issue in that case was a narrow one, as the Court noted,

> "The sole question in this case is whether these clerks qualify as neutral and detached magistrates for purposes of the Fourth Amendment."

The case turned on the constitutionality of allowing Tampa Municipal Court clerks to issue arrest warrants for the breach of municipal ordinances. However as this Court pointed out, these clerks "may not issue a search warrant or even a felony or arrest warrant for violations of state laws." (p. 347)

In the present case, the court below in affirming the denial of Appellant's petition for habeas corpus, held that the denial of a fair trial could be cured by the right of "de novo" appeal. However, we believe that this argument does not diminish the strength of the constitutional objection. As Commonwealth police courts are not courts

of record, no court reporter will be present unless the defendant has the funds to hire a reporter for his trial. Thus, the indigent will not be able to preserve error for purposes of appeal. Indeed, many litigants do not understand the notion of an appeal; justice for them is frozen at the moment of the trial judge's decision. However, even more significant is the fact that the right to appeal will not feed the family of the poor man who was unjustly incarcerated pending his appeal, nor restore his reputation in the community, nor prevent him from losing his job. Moreover, the right to appeal cannot right the wrong that was done to an accused who has already served the full term of his sentence by the time of the appeal.

No showing of actual prejudice should be required to invalidate the procedure in this case. As Justice Clark noted in *Estes v. Texas*, 381 U.S. 532 (1965), when "a procedure employed by the state involves such a probability that prejudice will result that it is deemed inherently lacking in due process," no showing of prejudice is necessary. We believe that the procedure of permitting lay judges to preside over criminal misdemeanor trials and at preliminary examinations for both felony and misdemeanor arrestees, to issue search and arrest warrants, and to set bail is so fraught with danger that arbitrary action is likely to result.

In a recent State District Court attack on the non-lawyer justice of the peace system in Salt Lake County, Utah, a "two-tiered" court system with similar "de novo" procedures to Kentucky, where lay judges are permitted in the county, but not in Salt Lake City, the District court judge in invalidating the lay judge's power to imprison, rejected the "de novo" appeal argument, as follows:

> "The defendants nevertheless argue that the "two-tiered" system in Utah of de novo appeals meets the requirements of Due Process, if only after and by virtue of an appeal "anew" to a lawyer judge, and thus saves the system from any constitutional infirmity. But must a defendant incur the added expense, both in time and money, of an appeal in order to be afforded Due Process? I think not. The availability of a trial de novo on appeal does not guarantee a fair trial in the justice court, the court with which we are here dealing. Plaintiffs are entitled to Due Process and a fair trial in the first instance. *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972)." (Shelmidine v. Jones, District Court—Third Judicial District Salt Lake County Utah Case No. 224948—(June 3, 1975) (A. 34a; 38a, 39a)

The foregoing analysis leads us to believe that criminal defendants in lay judge courts are denied their constitutional right to a fair trial in violation of the due process clause of the Fourteenth Amendment. The complexity of the lay judge's task requires knowledge which can only be gained by familiarity with statutory law and recent decisions. The right to appeal cannot give back what the police court trial has already taken away. Such a procedure is so inherently lacking in due process that it should be invalidated without any necessity to show actual prejudice.

IV.

THE LAY JUDGE SYSTEM IS NO LONGER JUSTIFIED BY NECESSITY AND IS CONTRARY TO THE PRESENT TREND.

The original justifications for the lay justice system were the lack of trained professionals and the inability of citizens in a less mobile period to travel to populous areas (See Beard, *The Office of Justice of the Peace in England;* McConnell, "Some Trials of the Magistrate,"

54 ABA J 37 (1968); Vanlandingham, "The Decline of the Justice of the Peace," 12 Kan. L. Rev. 381 (1942), Pesident's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* (1967) at 34; Note, "The Justice of the Peace in Virginia; A Neglected Aspect of the Judiciary," 52 Va. L. Rev. 151 (1966)). However, the lay judge court is an anachronism. Today, most areas have an ample complement of attorneys located within a short driving distance from the farm. Moreover, if rural courthouses are intended for the convenience of defendant, the accused should have a choice as to whether he would prefer a convenient location or a courtroom where the judge is trained in the law.

The current trend in judicial reform is the adoption of unified court systems which do away with lower courts over which there is no centralized administrative control. In addition to the growing number of states which are unifying their court systems, moreover, a compilation[2] of the current laws concerning criminal jurisdiction by lay judges (A. 1a-33a), leads us to the conclusion that an increasing number of states are abandoning lay judge systems. At the present time, the laws of 15 jurisdictions exclude lay judges from hearing cases in which the defendant is charged with a crime punishable by imprisonment: Connecticut, the District of Columbia, Georgia, Illinois, Louisiana, Maine, Michigan, Missouri, New Jersey, Oklahoma, Rhode Island, Tennessee, Texas, Vermont and Wyoming. Of

[2] This compilation was the result of research and analysis performed by Rosemary Camilleri, a graduate student at the University of Chicago and was updated by Ina Marks, attorney.

these 15 jurisdictions, moreover, 11 also have precluded lay judges from presiding over preliminary hearings and issuing search and arrest warrants. Furthermore, as of August 14, 1974, as a result of the California Supreme Court decision in *Gordon v. Justice Court*, 525 P. 2d 72, lay judges are forbidden from imposing sentences of imprisonment. In June 1975, the Utah legislature amended Title 78, Sec. 5-4, according defendants the right to attorney judges where there is an option of imprisonment. (Utah House Bill No. 1—1st Special Session, 1975). These facts indicate a significant trend toward the abolition of lay judge jurisdiction over criminal matters in the various states.

A model for the states was provided by the Federal Magistrates Act, 82 Stat. 1107 (1968). That Act replaced Title 28, Chapter 43 of the United States Code which had provided for United States Commissioners who were not required to have legal training. The new law required all full-time federal magistrates to be members of the bar.

The rights of defendants in state and local courts are just as precious as those of federal defendants. We believe that, if the various state legislatures are unable to remove the taint of unconstitutionality from the present practice by abolishing the lay judge system, this court must act.

It was the consensus of the 1971 National Conference on the Judiciary that, "judges should be full-time officials, professionally trained in the law and aware of its traditional values." (Consensus Statement of the National Conference on the Judiciary," 55 J. Amer. Jud. Soc. 29, at 30 (1971)). This is not a novel view. The authors of the Magna Carta proclaimed,

> We will not make any justiciaries, constables, sheriffs or bailiffs, but from those who understand the law of the realm and are well disposed to observe it. Magna Carta XLV

Where the Supreme Court of California, recently held, in the case of *Gordon v. Justice Court*, supra, that the use of non-lawyer judges in criminal cases where a jail sentence may result was a patent denial of due process of law; they particularly noted that a 1972 state study revealed that 37 per cent of non-attorney justice court judges had no education beyond high school; at least 13 of these judges had not completed high school. (Note 7) (Hennessey, Qualification of California Justice Court Judges: A Dual System, 3 Pac. L. J. 439, 445-446).

The California opinion also directed one's attention to our existing Standards for the judiciary, by noting that the Commission on Standards of Judicial Administration of the American Bar Association emphasizes the importance of a properly educated judiciary. In its Standards Relating to Court Organization (Final Draft 1974), Section 1.21, subdivision (a), requires that all judges "should have a broad general and legal education and should have been admitted to the bar." (P. 29) The Commentary on Sec. 1.21 states that "Selecting competent judges is the most important aspect of establishing and maintaining an excellent court system. . . . They should have a breadth of education sufficient to understand the variety of problems that come before the courts. They should be professionally qualified as lawyers so that they can interpret and apply the law competently." (Id., pp. 31-32).

Moreover, it is settled in the Canons of Judicial Ethics that, "A judge should be mindful that his duty is the

application of general law to particular instances. . ." (ABA Canons of Professional and Judicial Ethics, Canon 20). Thus, a judge is obligated to apply the laws as set forth by the federal and state constitutions, legislation, and court-made precedents, rather than to do "justice" as he sees fit.

The public's image of our criminal justice system is particularly critical in the present era of close re-examination of every facet of our society.

> Trial courts of limited jurisdiction . . . have unlimited capacity to affect public attitudes toward law for better or worse. It is these courts, not the appellate courts, that the people generally know first hand. What they observe there of justice or injustice, of efficiency or bumbling, determines whether they will look upon courts with respect and pride or with cynicism. Justice Traynor, "Rising Standards of Courts and Judges," 40 Cal. S. B. J. 677 (1965)

The consensus of scholarly writing on the subject is that "careful consideration should be given to total abolition of these offices and transfer of their function to district or circuit judges who have full-time professional standing." *The Challenge of Crime in a Free Society*, at 129 (1967). Several authors have reached this conclusion after studying the lay justice systems in their states. Judge Howard K. Zimmerman has written that the use of non-professional judges has produced a discriminatory dual system of justice in Oregon, where, he says, "we have two systems of justice: one a reasonably good one in our circuit courts for the well-to-do or rich man, and the other, often a woefully poor one, in our justices' courts for the poor man," 21 Ore. L. Rev. 380 (1942). After a study of the lay judge system in Nebraska Ronald J. Dolan and William B. Fenton concluded that the qualifications of the vast majority of justices were so poor that the best solution would be "to

terminate the entire justice of the peace system," 48 Neb. L. Rev. 457, 474 (1969). A similar study of the Florida lay judge system concluded that "the astounding absence of educational qualifications for the office of justice of the peace engenders disrespect and suspicion of the court in the public's mind . . .," 18 U. Fla. L. Rev. 109, 124 (1965). In "The Justice of the Peace: Constitutional Questions," 69 W. Va. La. Rev. 314 (1967), the author examined the constitutional and legislative bases of West Virginia's lay judge structure and suggested that the system violates the due process guarantee of the Fourteenth Amendment.

Authors who have done general studies of lay judge systems across the country have agreed that the systems should be abolished. In James, *Crisis in the Courts*, after observing lay criminal judges in various states and parts of the country, it was recommended that all states should "follow the lead of those states that have simply done away with untrained minor criminal judges." James noted the observation and recommendation of the President's Commission on Law Enforcement and the Administration of Justice:

> Study commissions have pointed out the scandal of the lower criminal courts for over a century. More than thirty years ago, the Wickersham Commission concluded that the best solution to the problem would be the abolition of these courts. The commission agrees.

The improvement of our criminal justice system is one of today's most pressing problems. As the Task Force on Courts stated,

> Although the lower courts are the most important in the criminal justice system, they are the most neglected. They are the most important courts in the system because they handle the largest number of cases and because they have jurisdiction over

> many of the crimes that are more visible to the public. Yet these courts operate with meager facilities and poorly trained personnel.
>
> Task Force Report: The Courts, President's Commission on Law Enforcement and Administration of Justice (1967)

Finally, a judicial system which assures the presence of qualified counsel of right in any serious criminal case must do no less than assure the existence of a qualified tribunal as well.

As Chief Justice Burger stated, in delivering his 1975 Annual Report on the State of the Judiciary:

> "Many of the problems of the courts are closely related to the quality and competence of the major official participants . . . the contending lawyers *and the judges* . . . and the Standards of professional conduct that govern in the courts."

CONCLUSION

For the reasons stated it is respectfully submitted that this Honorable Court will grant the relief requested by Appellants.

Respectfully submitted,

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APPENDIX

Appendix "A"

STATE AND COURT SYSTEM	Educational Qualifications of Judges Having Criminal Jurisdiction	CRIMINAL JURISDICTION OF NON-LAWYER JUDGES		
		Misdemeanors	Preliminary Hearings	Warrants
ALABAMA SUPREME APPEALS CIRCUIT DISTRICT PROBATE / MUNICIPAL	Qualifications of judges. Judges of the supreme court, court of appeals, circuit court and district court shall be licensed to practice law in this state and have such other qualifications as the legislature may prescribe. Judges of the probate court shall have such qualifications as may be provided by law. Const. Art. 6, Sec. 146 Judges of Municipal courts shall be licensed to practice law in the state and have such other qualifications as the legislature may prescribe Const. Art. 6, Sec. 145 * 1973 Amendments	*Art. 6, Sec. 160 (1973) permits continuation of intermediate trial courts for four years with jurisdiction over misdemeanors, preliminary hearings and issuance of warrants. Professor Charles B. Cole, Consultant to Alabama Office of Courts Management advises that intermediate trial courts primarily county courts, now exist in 85 jurisdictions and have approximately 32 non-lawyers as judges.		
ALASKA Supreme Superior District Magistrate	Supreme, Superior, and District Court Judges must be licensed to practice law. Const. Art. IV Sec. 1 Tit. 22, Sec. 15.160 No provision requiring legal education for Magistrate; additional qualifications may be set by Supreme Court, but none as yet have been set. Tit. 22, Sec. 15.160(b)	Magistrate: jurisdiction of all misdemeanors other than violations of ordinances of political subdivision, if defendant consents in writing that magistrate may try him, or if defendant wishes to plead guilty. Tit. 22, Sec. 15.120 (6)	Magistrate may hold preliminary hearings, set, receive, and forfeit bail. Tit. 22 Sec. 15.100(5)	Magistrate may issue arrest and search warrants. Tit. 22, Sec. 15.100

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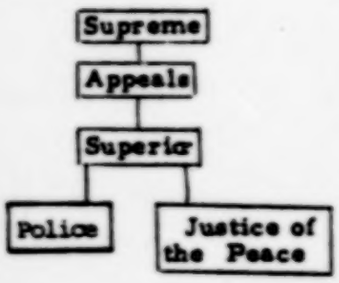
ARIZONA 	Supreme Court, Court of Appeals, and Superior Court Judges must be admitted to practice law in Arizona. Const. Art 6 sec 6 Tit. 12 sec 120.01 Const. Art 6 sec 22 No provision requiring legal education for Justice of the Peace, or Police Court Judge (who may be a J. P. simultaneously). Tit. 22 sec 111 Tit. 22 sec 403 (b)	J. P. has jurisdiction of such misdemeanors as petty theft, assault or battery (non-felonious), breach of peace, and other misdemeanors up to $300 fine or 6 months in county jail or both. Tit. 22 sec 301A J. P. "criminal Jurisdiction shall be limited to misdemeanors." Const. Art 6 sec 32 Police Court Judge has concurrent jurisdiction with J. P. in precincts in which city or town is located of violations of state laws committed within city limits. Tit. 22 sec 402	J. P. may hold preliminary examinations and may admit to bail. Tit. 22 secs 301, 313, & 314 Police Court judge has same powers as Justice of the Peace. Tit. 22 sec 402	J. P. may issue arrest warrant. Tit. 22 sec 311 (b) Police Court judge has same powers as Justice of the Peace. Tit. 22 sec 402

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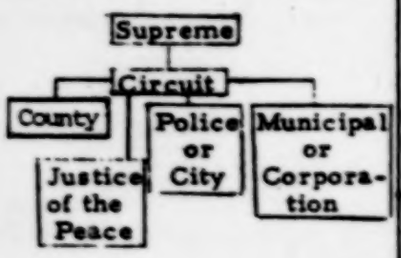
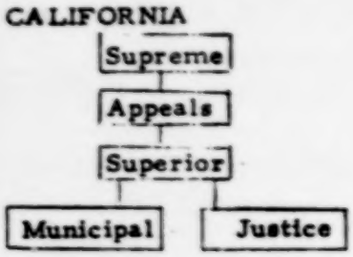
ARKANSAS  (Police or City Court abolished in cities or counties with Municipal or Corporation Courts.) Tit. 22 sec 702	Supreme Court, Circuit Court Judges, must be practicing lawyers. Const. Art. 7 secs 6 & 16 Municipal Court Judge must be a licensed attorney Tit. 22 sec 704.4 No provision requiring legal education for Justice of the Peace, Police or City Court Judge Const. Art 7 sec. 41 Tit. 22 sec. 812 No provision requiring legal education for mayor.	J. P. has jurisdiction in "all matters less than felony." Tit. 43 sec. 1405 Police Court Judge: jurisdiction concurrent with circuit & justice courts for all misdemeanor cases within city limits. Tit. 44 sec 115 Tit. 43 sec 1405	J. P. may hold preliminary hearings, and may set bail Const. Art 7 sec 40 Tit. 44 sec 209 Police or City Court Judge may set bail. Tit. 44 sec 111	Justice of the Peace may issue arrest warrants. Tit. 43 sec 406 Tit. 44 sec 203 Police Court Judge may issue arrest warrant Tit. 43 sec 406 Mayor may issue arrest warrant Tit. 43 sec 406
CALIFORNIA  (Police Court)* *Allowed by Const. Art 11 sec 8½, but governed by no state statutes as each chartered city must set up & regulate its own if it so chooses.	Supreme, Appeals, and Superior Court Judges must be lawyers admitted to practice in Calif. Const. Art 6 sec 23 Municipal Court Judge must be a lawyer OR elected judge or justice of existing court superseded by municipal court for 5 years as of 1950. Const. Art 6 sec 23 *Justice Court Judge must be lawyer OR have passed exam. prescribed by Judicial Council OR be incumbent of superseded court. West's Ann. Gov. Code sec 71601	Justice Court: misdemeanors up to $1000 fine or 1 year in prison or both, except those of which other courts are given exclusive jurisdiction or cases under PEN 272† West's Ann. Crim. Proc. Code sec 1425 *PEN 272: causing or contributing to deliquency of person under 21 or inducing disobedience to court order.	Justice Court: may hold preliminary examination and may set bail. West's Ann. Pen. Code sec 808, 859, 871 *As of Aug. 14, 1974, as a result of the California Supreme Court decision in Gordon v. Justice Court, 525 P. 2d 72, non-lawyer justice court judges are prohibited from imposing sentences of imprisonment.	Justice Court may issue arrest warrants. West's Ann. Pen. Co secs 807, 808

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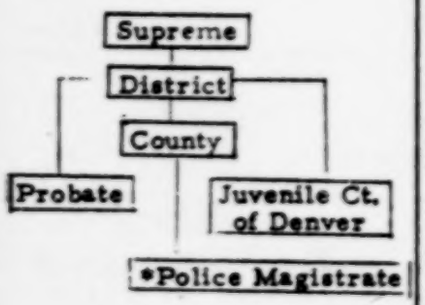
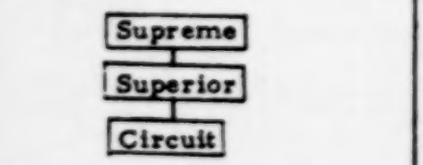
COLORADO  *in towns and cities Justice of the Peace replaced by County Court Ch. 37 sec 18-3	Supreme & District Court Judges must be lawyers. Const. Art VI secs 8, 11 County Court Judge must be practicing lawyer in class A, B, and C counties. There are 41 class D counties in which County Judge need only have high school education. Ch. 37 sec 14-3 Non-lawyer judges of County Court must attend institute on its duties and functioning. Ch. 37 sec 14-3(5) No provision requires legal education for Police Magistrate. Ch. 139 secs 86-4, 85-5	County Judge has misdemeanor jurisdiction concurrent with District Court. Ch. 37 sec 7-1 supp 65 Police Magistrate has exclusive jurisdiction ONLY of city ordinances in towns and in cities up to 50,000 population. Ch. 139 secs 84-5, 85-5, 86-4	County Judge may hold preliminary examinations and may set bail. Ch. 39 sec 2-12	County Judge may issue warrants. Ch. 39 sec 2-3 Police Magistrate in cities between 25,00 and 50,000 population "shall issue summons or warrant for violation of city ordinance." Ch. 139 sec 85-12
CONNECTICUT  (Juvenile, Common Pleas, and Town Courts abolished and replaced by Circuit Court.) Tit. 51 sec 273	Supreme, Superior, and Circuit Court Judges must all be members of the Connecticut bar. Tit. 51 sec 47 After Dec. 31, 1960, no judicial business shall be transacted by any J. P., trial justice, borough, city, town or police court judge. All such judicial business shall be deemed to be pending before the circuit court. Tit. 51 sec 273	No non-lawyer judge has any criminal jurisdiction in any court of the State of Connecticut.		

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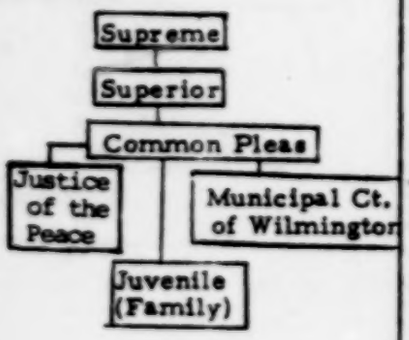
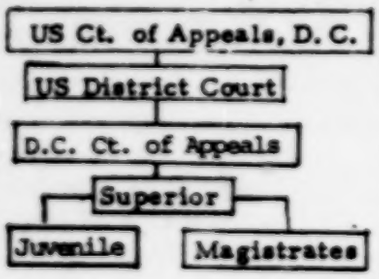
DELAWARE  	Supreme and Superior or State Judges must be "learned in the law". Const. Art 4 sec 2 Judges of the Family Ct. for New Castle Co., Common Pleas Court for New Castle Co. & for Kent & Sussex Counties, and the Municipal Court of Wilmington, shall be admitted to practice law in Delaware. Tit. 10 secs 907(d), 1302(b) 1502(b), 1602(b), 1702(b). No provision requiring legal education for Justice of the Peace or for the Judge of the Juvenile & Family Court of Kent & Sussex Counties. Const. Art 4 secs 29, 30; Tit. 10 sec 1105	J. P. has misdemeanor jurisdiction "when expressly conferred by law." Tit. 11 sec 2701 Family Court of Kent & Sussex Co.: intra-family non-felonies & other misc. causes. Tit. 10 sec 1101 note	J. P. may hold preliminary hearing, and admit to bail. Tit 11 sec 5917; J. P. Rule #28 *Such Justices may not consider motions to suppress evidence Hamilton v. McLaughlin 317 A. 2d 542 (1974)	Justice of the Peace may issue all warrants. Tit. 10 sec 9501
DISTRICT OF COLUMBIA  	All judges of District of Columbia Courts must be members of D. C. bar. Tit. 11 sec 1501(b)	No non-lawyer has any criminal jurisdiction in any court of the District of Columbia.		

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FLORIDA Supreme District Ct. of Appeals Circuit County	Judges of Supreme Court, District Court, Circuit Court, and (unless otherwise provided by general law) of County Court must be members of the bar of Florida. Const. Art 5 sec 8 County judge in county with population less than 40,000 need not be member of bar. Const. Art 5 sec 20(c)(11) Judges of old municipal courts, ex-J. P.'s or ex-magistrates may be elected county court judges even if they are not lawyers. Const. Art 5 sec 20(d) (4) and sec 20(d)(7)	County Judge has misdemeanor jurisdiction. Tit. 5 sec 34.01(4)	County Judge, as magistrate, may conduct preliminary hearing and may admit to bail. Criminal Procedure Rules 3.122 & 3.130	County Judge, as committing magistrate, may issue arrest warrant. Criminal Procedure Rule 3.120
GEORGIA Supreme Appeals Superior City, County, Municipal Justice of the Peace	Judges of Supreme, Superior, Appeals, City, County, and Municipal Courts must be practicing lawyers in Georgia. Const. Art VI ch. 2 sec 4801 and Ch. 24 sec 2111a No provision requiring legal education for Justice of the Peace. Ch. 24 sec 402	Non-lawyer judges do not have misdemeanor jurisdiction	Justice of the Peace has jurisdiction "in examining any such person brought before him, and in committing, binding over, or discharging such person." Ch. 24 sec 1501(3)	Justice of the Peace may issue arrest warrants. Ch. 24 sec 1501(2)

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HAWAII Supreme Circuit District	Supreme and Circuit Court Judges shall be practicing lawyers in Hawaii. Const. Art V sec 3 District Court Judges in districts of N. Hilo, S. Hilo, Puna & Wailuku, and Honolulu must be licensed attorneys. In other districts, except Kalawao, judges need only pass an examination. Section 604-1 statutes	District Magistrates: criminal jurisdiction up to fine, or 1 year in prison, or both. No grand jury offenses. Section 604-8 statutes	District Magistrates may conduct preliminary hearings. Section 604-8 statutes	District Magistrates: may issue search warrants. Section 604-9 statutes
IDAHO Supreme District Magistrate Probate, Police, and Justice of the Peace Courts abolished as of Jan 11,1971 Title I, sec. 103	Supreme and District Court Judges must be "learned in the law." Const. Art 5 sec 23 and Tit. 34 sec 615 Magistrate must have high school education, (but lawyer magistrates have additional duties. Ex-Probate, Police Judges, & J. P.'s are eligible to be appointed magistrates, and all magistrates must attend an Institute established by the Supreme Court. Tit. 1 sec. 2206	Magistrates (non-lawyer) have jurisdiction of misdemeanors up to $1000 fine or 1 year in county jail or both. Tit. 1 Sec. 2208 (3)(a)	Magistrate may hold preliminary examination... State v. Raaf, 16 Idaho 411, 101 Pac. 747 ...and may admit to bail. Tit. 19 sec. 2902	Magistrates (non-lawyer) may issue warrants for arrest or search. Tit. 1 sec. 2208(3)(c)

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ILLINOIS Supreme Appellate Circuit	"No person shall be eligible to be a Judge or Associate Judge unless he is a U.S. citizen, a licensed attorney-at-law of this State, and a resident of the unit which selects him. No change in the boundaries of a unit shall affect the tenure in office of a Judge or Associate Judge incumbent at the time of such change." Const. (1970) Art 6 sec. 11			

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INDIANA Supreme Appellate Circuit, Superior, Criminal County, Magistrate, Justice of the Peace City & Town	Judges of Supreme and Appellate Courts must be admitted to practice law in Indiana. Const. Art 7 sec. 10 Superior Court Judge must be admitted to practice law in Indiana. Tit. 4 sec 6905 Circuit Court and Criminal Court Judges must be lawyers. Const. Art 7 sec. 7 Tit. 4 sec. 5702 County Municipal Judge must be a lawyer. Tit. 4 sec. 5814 Magistrate must be a lawyer. Tit. 4 sec. 5922 City & Town Court Judges --no provision requiring legal education. Tit. 4 secs. 6027, 6002 Justice of the Peace is required to pass an examination approved by the Indiana Supreme Court. Tit. 5 sec. 108(a)	Justice of the Peace has concurrent criminal jurisdiction with criminal and circuit courts for all misdemeanors punishable by fine only; may assess fines up to $25. Tit. 9 sec. 715 In their own county, Town Court Judges have jurisdiction as J. P., concurrent jurisdiction with circuit or criminal court in petit larceny and all violations of state law up to $500 fine or 6 months in prison or both. Tit. 4 sec. 6027 City Judge has misdemeanor jurisdiction same as J. P. and concurrent with circuit & criminal courts in petit larceny, assault, battery and all violations of state law up to $500 fine or 6 mo. in prison or both. Tit. 4 sec. 6002	City and Town Court Judges may hold preliminary hearings and may set bail. Tit. 4 secs 6002, 6027	Justices of the Peace or City Judges may issue arrest warrants. Tit. 9 sec. 701

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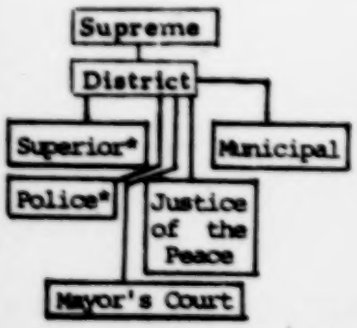
IOWA  *Abolished in cities or towns where minicipal court is established. Tit. 30, sec. 602.17	Judges of all courts of record (except Police Courts) that is, Supreme, District, Superior, and Municipal Courts, must be licensed attorneys. Tit. 30, secs. 605.14, 603.20, & 604.1 Municipal Court Judge must be a practicing lawyer. Tit. 30, sec. 602.7 No provision requiring legal education for Justice of the Peace, or Police Judge or Mayor. Tit. 30 sec. 605.14 Tit. 15, sec. 363.8	J. P. has jurisdiction of all offenses less than felony in which punishment is not more than $100 fine or 30 days in prison. Const. Art 1 sec. 11	Police Court, J. P. may take preliminary informations and may set bail. Tit. 36 sec 748.1, 748.2 Mayor's Court may take preliminary informations and may set bail. Tit. 36 secs. 748.1, 748.2.	Justices of the Peace Police & Mayor's Court Judges may issue warrants. Tit. 36, sec. 748.1, 748.2

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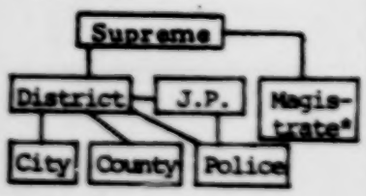
KANSAS  *Exists only in certain Counties. Ch. 20 sec 2501	Supreme & District Court Judges & Magistrate must be lawyers authorized to practice in Supreme Court of Kansas Const. Art 3 sec 2(h) Ch. 20 sec 2503 City Court Judge must be lawyer admitted to practice in District Court of Kans. Ch. 20 sec 1406 County Court Judges are Probate Court Judges, who need NOT be attorneys in counties with population less than 24,000 (there are 85 such counties in Kans.) Ch. 20 sec 803 No provision requiring legal education for Justices of the Peace Ch. 80 sec 202 Police Court Judge in 1st class city or 2nd class city with pop. over 13,900 must be admitted to practice law in Kansas Ch. 13 sec 628(b) Police Court Judges in 2nd class cities with pop. under 13,900 and in 3rd class cities, need not be lawyers. J. P. may be Police Court Judge in these cities. Ch. 14 sec 201	Courts of limited jurisdiction (i. e. "all courts of the state except the supreme court, district courts, probate and juvenile courts, municipal or police courts and small debtors courts...") shall have concurrent jurisdiction with the district court in cases of misdemeanor. KSA 1971 supp. Ch. 22 sec 2601 County Judge: specifically 'trial of misdemeanor charges." Ch. 20 sec 808	County Judge may hold preliminary examination of felony charges. Ch. 20 sec 808 Second class city Police Judge may set bail. Ch. 14 sec 806	All magistrates (i. e., supreme & district court judges, and judges of courts exercising limited criminal jurisdiction) may issue arrest warrant. KSA 1971 supp. 22-2202 Second & Third Class City Police Court Judges may issue arrest warrants Ch. 14 sec 806 Ch. 15 sec 506

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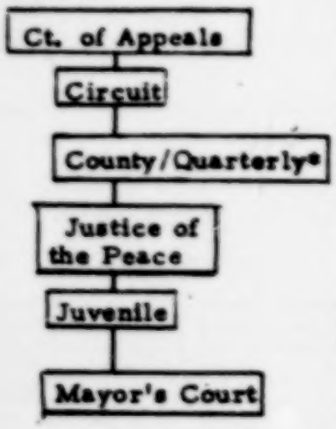
KENTUCKY  *Quarterly Court is presided over by County Judge	Court of Appeals and Circuit Court Judges must be practicing lawyers. Const. sec. 114, 130 County/Quarterly Court Judges: no provision requiring legal education. Const. sec. 100 No provision requiring legal education for Justice of the Peace or Police Judge in 2nd thru 6th class cities. Const. sec. 100 Tit. 4, Ch. 26, secs. 180, 190, 200 & 150. Police Judge in 1st class city must have qualifications of Circuit Court Judge. Tit. 4 Ch. 26 sec. 140	County/Quarterly Ct. Judge has misdemeanor jurisdiction concurrent with Circuit Ct. up to $500 fine or 1 yr. imprisonment or both, and exclusive criminal jurisdiction for offenses with fines under $20. Tit. 4 Ch. 25 sec. 010 Police Judges in cities of every class have exclusive jurisdiction of misdemeanors up to $20 fine, and of all offenses against city ordinances, within their own city; and concurrent jurisdiction with Circuit Ct. of misdemeanors up to $500 or 1 year or both. Tit. 4 Ch. 26 sec. 010	County/Quarterly Ct. Judge may hold preliminary hearing and admit to bail. Tit. 4 Ch. 25 sec. 012 Justice of the Peace may hold preliminary hearing. Tit. 4 Ch. 25 sec. 012 Police Judges in cities of all classes have jurisdiction as examining ct. of all public offenses committed within the city limits, except homicide in the cases of 2nd to 6th class cities. Tit. 4 Ch. 26 sec. 020 Police Judge in 3rd class city may admit to bail. Tit. 4 Ch. 26 sec. 180	J. P. may issue "original or final process in any case within his jurisdiction." Tit. 4 Ch. 25 sec. 640 Judge of County/Quarterly Court appoints clerk to issue warrant of arrest. Tit. 4 Ch. 25 sec. 480 Police Judge in 2nd class city may issue arrest warrants in cases of unlawful assembly or rout, etc. Tit. 4 Ch. 26 sec. 160 Police Judge in 3rd class city has same powers as J. P. and may make arrests. Tit. 4 Ch. 26 sec. 180

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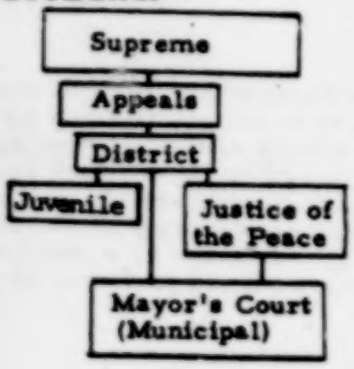
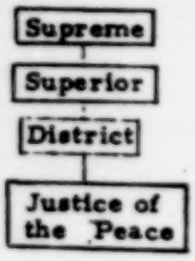
LOUISIANA  	Supreme Court, Court of Appeals, and District Court Judges shall have practiced law in Louisiana. Const. Art 7 secs 6, 19, 33 Juvenile Court Judge shall have practiced law in La. Const. Art 7 sec. 96 Justice of the Peace--no provision requiring legal education. Const. Art 7 sec. 47 Mayor's Court has jurisdiction of offenses against municipal ordinances only. West's LSA:RS sec. 33:441		J. P. has "criminal jurisdiction as committing magistrate only, with power to bail or discharge in cases not capital or necessarily punishable at hard labor." Const. Art 7 sec. 48 J. P. has power to conduct preliminary examinations in cases not capital or necessarily punishable at hard labor. LSA:CCP Tit. 7 Art. 291 (3)	Justice of the Peace or Mayor of Mayor's Court may issue warrants of arrest. LSA:CCP Tit. 32 Art 931 & comment (d)
MAINE  	Supreme & Superior Court Judges must be "learned in the law." Const. Art 4 secs 1 & 101 District Court Judges must be members of state bar and are ex officio J. P.'s. Const. Art. 4 secs 157, 158 Attorneys admitted to practice in courts of Maine have all powers of J. P.'s. Tit. 4 sec. 1056 Other J. P.'s are appointed by Governor--no provision requiring legal education. Const. Art. V Pt. 1 sec. 8	Justice of the Peace has no criminal jurisdiction.	. . . . .	Justice of the Peace may NOT issue arrest warrants. Tit. 15 sec. 702

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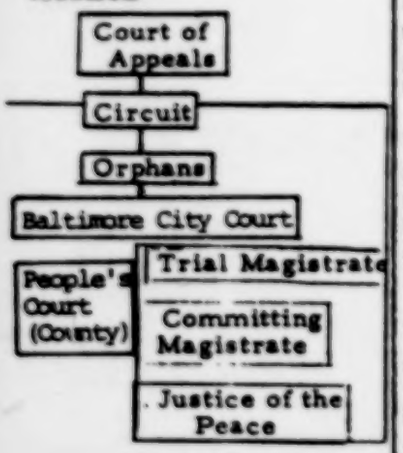
MARYLAND *  	Judges of Court of Appeals, Circuit, Orphans' and Baltimore Courts must be practicing lawyers. Const. Art IV sec. 2 No provision requiring legal education for Justice of the Peace. Const. Art IV secs 1 & 2 Ann. Code Md. Art 52 secs 1 through 4. Trial Magistrates of Montgomery, Prince George's & Anne Arundel Counties must be attorneys. Ann. Code Md. Art 52 secs 98, 98A, 98B, 125, 125A, 125B.	Trial Magistrate has jurisdiction of misdemeanors. Ann. Code Md. Art 52 sec 13(a) Justice of the Peace other than trial magistrate has no criminal jurisdiction. Ann. Code Md. Art. 52 sec. 103	Trial magistrate may conduct preliminary examinations and committing magistrate may take bail. Ann. Code Md. Art 52 sec. 98B(9)(c)	Justice of the Peace may issue arrest warrant. Ann. Code Md. Art 52 secs 22-24 Committing Magistrate may issue arrest warrants. Ann. Code Md. Art 52 sec. 98B(9)(c)

The courts of limited jurisdiction are not uniform in Maryland. Trial magistrates operate on a part-time basis in 18 of aryland's 23 counties. The magistrates need not be legally trained. In felony cases, they may conduct preliminary earings to determine whether there is sufficient evidence to hold the accused for further proceedings. Trial magistrates oceedings are not of record and are without a jury. People's courts operate in seven counties. In five of these counties ere are no trial magistrates, as the people's court has jurisdiction over traffic offenses and criminal cases. Two unties, Baltimore and Dorchester, have both the People's Court and a trial magistrate. Committing magistrates are all counties but not in Baltimore City. They are usually laymen appointed by the Governor with the advice and consent the Senate. Committing magistrates serve part-time and have no power to try cases."

--NLADA National Defender Survey

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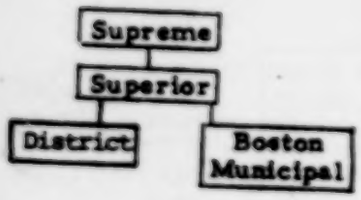
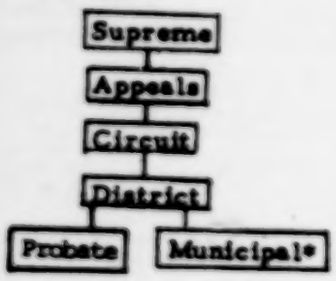
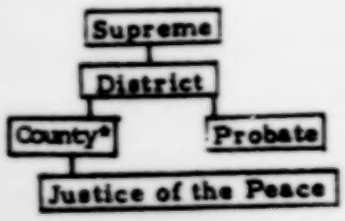
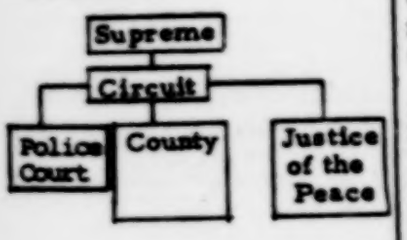
		Misdemeanors	Preliminary Hearings	Warrants
MASSACHUSETTS  	No provision requiring legal education for any judge	District Courts: original jurisdiction in all criminal cases. Judge may try cases up to 5 years in prison, but may not commit to state correctional institution. District Judge has jurisdiction of all misdemeanors except libel, with penalty up to 2½ years prison. MASS GEN LAWS ANN C. 218 sec 26	District Judge may hold preliminary hearings and may admit to bail. MASS GEN LAWS ANN C. 218 sec 30, C. 276 sec 57, C. 278 sec. 18	District Judge may issue warrants. MASS GEN LAWS ANN C. 218 sec. 35
MICHIGAN  *replaces Justice of the Peace, abolished by Const. Art 6, sec. 26	Judges of all courts must be licensed to practice law in Michigan. Const. Art 6 sec 19, MCLA 730.501, 730.508 and 168.467 However, incumbent justices of the peace who are not attorneys are eligible for re-election. MCLA 730.508			

STATE AND COURT SYSTEM	Educational Qualifications of Judges Having Criminal Jurisdiction	CRIMINAL JURISDICTION OF NON-LAWYER JUDGES: Misdemeanors	Preliminary Hearings	Warrants
MINNESOTA  *Municipal Courts abolished, replaced by County Courts.	Supreme and District Court Judges shall be "learned in the law" Const. Art 6 sec 5 County Court Judge shall be "learned in the law" and a Probate Judge now in office shall be considered "learned in the law." Ch. 487 sec. 03 No provision requiring legal education for Justice of the Peace. Const. Art 6 sec 8 Ch. 530 sec. 01 ff.	County Judge has jurisdiction of all misdemeanors in county. Ch. 487 sec 18(a)(1) Justice of the Peace has jurisdiction in criminal cases up to $100 fine or 3 months in prison. Const. Art 6 sec 8	County Judge may hold preliminary hearings and may admit to bail. Ch. 487 sec 25(8), (9) Ch. 487 sec 18 (b) Ch. 629 sec 52 Justice of the Peace may hold preliminary hearings and may set bail in all cases where penalty is less than 7 years in state prison. Ch. 628 sec 31 Ch. 629 sec 52	County Judge and Justice of the Peace may issue arrest warrants. Ch. 629, secs 41, 42
MISSISSIPPI 	Supreme, Circuit, and Chancery Court Judges must be practicing lawyers. Const. Art 6 secs 150, 154 County Court Judge must have all qualifications of Circuit Judge. Title 10 Ch. 10 sec 1608 No provision requiring legal education for J. P. Const. Art 6 sec 171 Police Court Judge shall be an attorney-at-law. Const. Art VI sec 3374-103	Justice of the Peace has jurisdiction concurrent with circuit court of all crimes whose punishment does not exceed fine and imprisonment in county jail. Tit. 10 Ch. 10 sec 1831	Justices of the Peace may set bail. Tit.10 Ch.10 sec 1835	Justices of the Peace may issue arrest warrants. Tit.10 Ch.10, sec 1832

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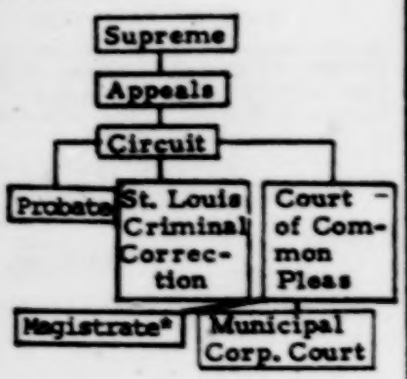
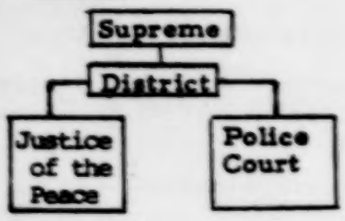
COURT SYSTEM	of Judges Having Criminal Jurisdiction	OF NON-LAWYER JUDGES: Misdemeanors	Preliminary Hearings	Warrants
MISSOURI  *replaces Justice of the Peace -Sched. 4	"Every judge and magistrate shall be licensed to practice law in this state" except present* J. P.'s or those who have been J. P.'s for 4 years --who are eligible to be magistrates. Const. Art 5 sec 25 * Constitution adopted in 1945.	Magistrate has concurrent jurisdiction with circuit court in all cases of misdemeanor, except in cities with criminal courts or as otherwise provided by law. Ch. 543 sec 010	Magistrate, being a court of record, may hold to bail. Ch. 542 sec 020	Magistrate may issue warrants for arrest. Ch. 544 sec 020
MONTANA 	Supreme and District Court Judges must be admitted to practice law in Montana. Tit. 93 secs 701, 801 No provision requiring legal education for Justice of the Peace or Police Court Judge. Ch. 7 secs 93-704 (J. P.)	J. P. has jurisdiction of petit larceny, 3rd degree assault, breach of peace, willful injury to property & all misdemeanors up to $500 fine or 6 months in prison or both. Tit. 93 sec 410 Police Court has jurisdiction in all cases under own city ordinances, and concurrent jurisdiction with J. P. of petit larceny, assault & battery, breach of peace, vagrancy, liquor laws, etc. Const. Art VIII sec 24 Tit. 11 sec 1602	J. P. or Police Judge may set bail; J. P. may hold preliminary examination. Tit. 95, secs 1103, 1201 Const. Art VIII sec 21	J. P. or Police Judge may issue arrest warrants. Tit. 95 sec 208

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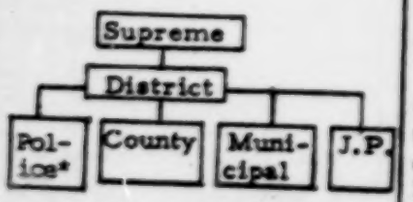
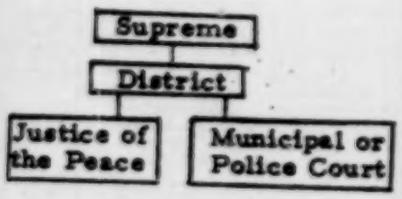
STATE AND COURT SYSTEM	Educational Qualifications of Judges Having Criminal Jurisdiction	CRIMINAL JURISDICTION OF NON-LAWYER JUDGES		
		Misdemeanors	Preliminary Hearings	Warrants
NEBRASKA  *in cities without municipal court Tit. 16 sec 302.01 (County Judges exercise same powers as J. P.'s) Tit. 24 sec 502	Supreme & District Court Judges must be attorneys admitted to practice in Neb. Tit. 24 secs 202, 301 County Judge must be attorney in Neb. in all counties with population of 16,000 or more UNLESS he has served as county judge for 4 years . There are 78 counties in Nebraska with populations under 16,000. Tit. 24 sec 501.01 Municipal Judge must be attorney. Tit. 26 sec 103 No provision requiring legal education for Police Magistrate or J. P. Tit. 16 sec 302.01	County Judge has criminal jurisdiction up to 6 months in prison or $500 fine or both. Tit. 24 sec 502 Police Magistrate has misdemeanor jurisdiction up to $100 or 3 months or both. Tit. 18 sec 201 Justice of the Peace has crim. jurisdiction up to $100 fine or 3 months in prison. Const. Art V sec 18	Magistrate (which includes county, municipal, police judges, J. P.'s and mayors) may conduct preliminary hearings. Tit. 29 sec 504 Tit. 18 sec 201 Police magistrate may take bail. Tit. 18 sec 202	Police Magistrate, J. P., mayors of cities & villages, and county judges ma issue warrants for arrest. Tit. 29 sec 403 Tit. 18 sec 202
NEVADA  	Supreme & District Court Judges must be licensed to practice law in Nevada. Tit. 2 sec 020 #2, Tit. 3 sec 060 No provision requiring legal education for J. P. Tit. 4 sec 010 Municipal or Police Judge must attend course arranged by Supreme Court on court procedure, statutory amendments and other developments of law.	J. P. has jurisdiction of petit larceny, assault & battery, breach of peace & all misdemeanors up to $500 fine or 6 months in prison or both. Tit. 4 sec 370(3) Municipal Courts have same criminal jurisdiction as J. P. Tit. 5 sec 050	All magistrates (including J. P. and Police Judge) may hold preliminary hearings and admit to bail. Tit. 171 secs 192, 196 Tit. 169 sec 095	All magistrates (including J. P. and Police Judge) may issu arrest warrants. Tit. 171 sec 106 Tit. 169 sec 095

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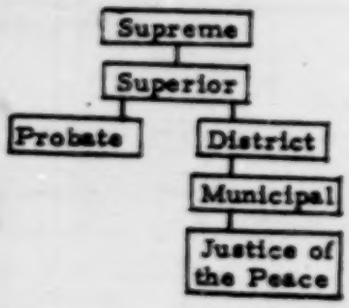
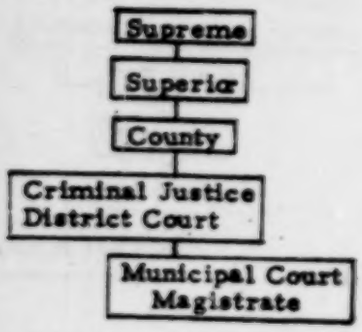
STATE AND COURT SYSTEM	Educational Qualifications of Judges Having Criminal Jurisdiction	CRIMINAL JURISDICTION OF NON-LAWYER JUDGES		
		Misdemeanors	Preliminary Hearings	Warrants
NEW HAMPSHIRE  	Qualifications of all judges (appointed by Governor) are governed by "rules of common law." Opinion of the Justices (1927) 83 NH 589, 139A 180.	J. P. may NOT hear criminal cases. N. H. Judicial Council 6th Report (1956) p. 34 District Court has original jurisdiction of all crimes up to $1000 fine or 1 year or both (except in towns with municipal courts). Ch. 502A:11 Municipal Court has jurisdiction of all crimes committed within town up to $500 fine or 1 year or both. Ch. 502:18	BUT. . . . . . District or Municipal court may hold preliminary examinations and may admit to bail. Tit. 59 Ch. 596A:1 Tit. 59 Ch. 597:1 Superior Court may admit to bail. Tit. 59 Ch. 597:4	J. P. may issue warrants in criminal cases. Ch. 592-A:5 Municipal Judge may issue warrants Ch. 592A:8 Municipal & District Judges may issue search warrants. Ch. 595A:1
NEW JERSEY  Justice of the Peace and Police Court abolished. Tit. 2A sec 8-12	Supreme, Superior and County Court Justices must be admitted to practice law in N. J. Const. Art 6 sec 6 para 2 Judges of Criminal District Court must be attorneys-at-law. Tit. 2A sec 7-6 Municipal Court Magistrate must be attorney OR must hold office of magistrate, recorder, police judge or J. P. as of Jan 1, 1952. Tit. 2A sec 8-7	Municipal Court Magistrate has jurisdiction over traffic laws, municipal ordinances, disorderly persons, and offenses of lesser grade than misdemeanor or as to which no indictment by grand jury is required. Tit. 2A sec 8-21	Municipal Court Magistrate may hold accused to bail. Tit. 2A sec 8-27	Municipal Court Magistrate may issue warrants. Tit. 2A sec 8-27

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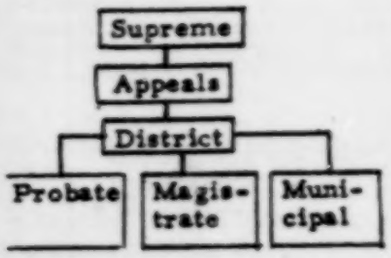
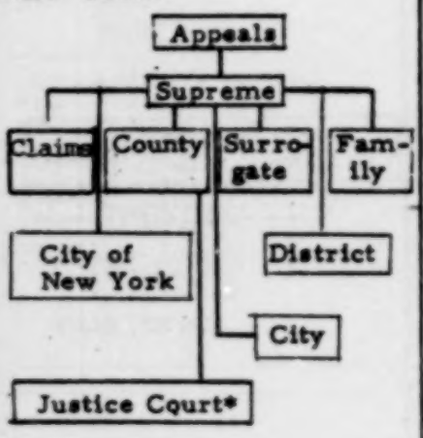
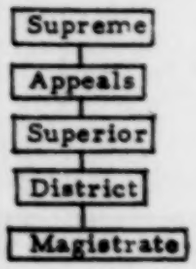
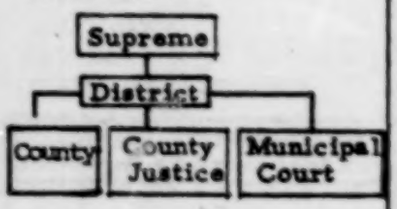
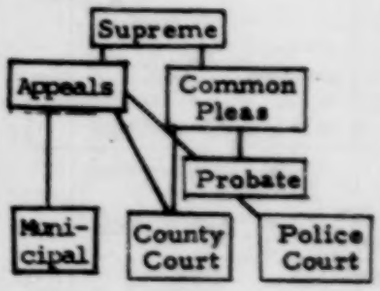
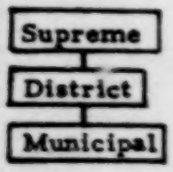
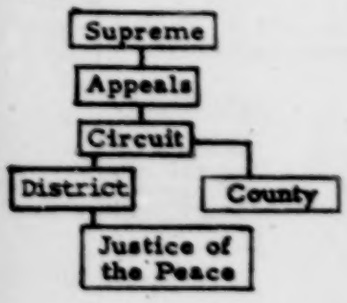
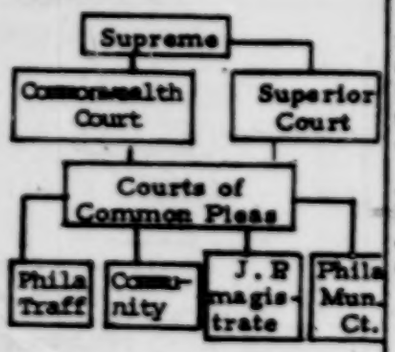
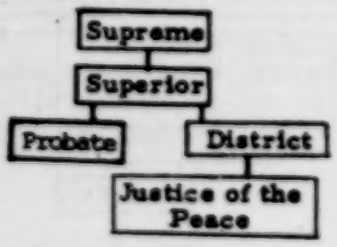
STATE AND COURT SYSTEM	Educational Qualifications of Judges Having Criminal Jurisdiction	CRIMINAL JURISDICTION OF NON-LAWYER JUDGES		
		Misdemeanors	Preliminary Hearings	Warrants
NEW MEXICO  	Judges of Supreme Court, Court of Appeals, and District Court must be learned in law and be in the actual practice of law. Const. Art VI secs 8, 14, 28 Magistrate must be lawyer in districts* with population greater than 100,000. Tit. 36 Art 2 sec 1 *a county = a district and only 1 county in N. M. has more than 100,000 pop. Magistrates must attend 1 magistrate training program per year. Tit. 36 Art 2 sec 4 Municipal Court Judge qualifications are to be determined by each municipality. No provision requiring legal education. Tit. 37 Art 1 sec 3	Magistrates have jurisdiction of all misdemeanors. Tit. 36 Art 3 sec 4 Municipal Court has jurisdiction over offenses under municipal ordinances. Tit. 37 Art 1 sec 2 Jurisdiction may be vested by municipal organization charter. Tit. 14 Art 15 sec 9	Magistrate may hold preliminary hearing and may admit to bail. Tit. 36 Art 3 sec 4B; Tit. 41 Art 23 sec 22 (Rule #22)	Magistrate may issu arrest warrant. Tit. 36 Art 6 sec 2 Municipal Judge may issue subpoenas and warrants. Tit. 37 Art 1 sec 2

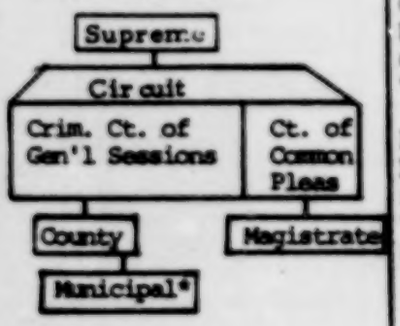
STATE AND COURT SYSTEM	Educational Qualifications of Judges Having Criminal Jurisdiction	CRIMINAL JURISDICTION OF NON-LAWYER JUDGES		
		Misdemeanors	Preliminary Hearings	Warrants
NEW YORK  *includes earlier Village, Town, and City Justice Courts. UJCA Art 23	Judges of Supreme, Appeals, Claims, Surrogate, Family, City of N. Y., District, County, or City Courts must be admitted to practice law in N. Y. or already hold such judicial office. Const. Art 6 sec 20(a) Justice Court Judge (i. e., Town, Village or City Justice) who has not been admitted to practice law, is required to attend training course prescribed by state legislature. Const. Art 6 sec 20(c), UJCA sec 105	Justice Court Judge has trial jurisdiction of misdemeanors concurrent with Superior* Court but subject to divestiture thereof by Superior Ct. in any particular case. CPL Tit. B sec 10.30 and UJCA sec 2001 *"Superior Court" means the Supreme Court or a county court. CPL Tit. B sec 10.10	Justice Court Judge has preliminary jurisdiction of offenses subject to divestiture thereof in any particular case by Superior Court. CPLTit. B sec 10.30 and UJCA sec 2001 JusticeCourt Judge may set bail. CPL Tit. B sec 10.10 and UJCA sec 2001	Justice Court Judge may issue arrest warrants. CPL 120.40 and UJCA sec 2001

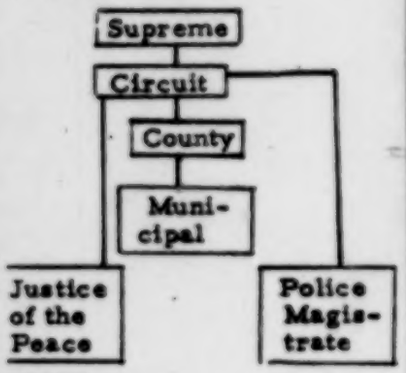
STATE AND COURT SYSTEM	Educational Qualifications of Judges Having Criminal Jurisdiction	CRIMINAL JURISDICTION OF NON-LAWYER JUDGES		
		Misdemeanors	Preliminary Hearings	Warrants
NORTH CAROLINA 	No provision requiring legal education for any judge. Const. Art IV	District Court Judge may try all misdemeanors in his municipality or within 1 mile of its borders. Ch. 7A sec 199(c) Magistrate has misdemeanor jurisdiction on pleas of guilty in offenses up to 30 days in prison or $50 fine; limited jurisdiction of traffic offenses. Ch. 7A sec 273(1), (2)	District Court Judge may hold preliminary hearings. Ch. 7A sec 199(c) Magistrate may conduct preliminary examinations and set bail. Ch. 7A sec 273	Magistrate may issue warrants for search and for arrest. Ch. 7A sec 273(4), (5)
NORTH DAKOTA 	Supreme, District, and County Judges with any jurisdiction besides probate must be "learned in the law." Const. Art IV secs 94, 107, 111 County Justice must be licensed attorney in N. D. Ch. 27 sec 18-02 Municipal Judge must be licensed attorney in cities over 3,000 population unless no such person is available in the city. Ch. 40 sec 18-01 Police magistrates are municipal judges. Const. sec 113	Police magistrates may try petit misdemeanors. Ch. 29 sec 01-15	Police magistrates may act as committing magistrates and admit persons to bail. Ch. 29 sec 01-15, 07-22, 01-03, 07-11	Municipal judge may issue arrest warrants Ch40 sec 18-07, 18-08 Police magistrate may issue arrest warrants. Ch. 29 secs 01-13, 01-14

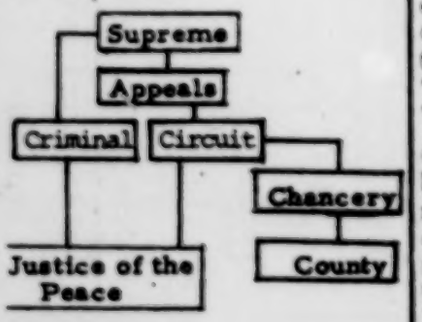
STATE AND COURT SYSTEM	Educational Qualifications of Judges Having Criminal Jurisdiction	CRIMINAL JURISDICTION OF NON-LAWYER JUDGES		
		Misdemeanors	Preliminary Hearings	Warrants
OHIO 	Supreme, Appeals, Common Pleas, Municipal and County Court Judges must be attorneys in Ohio. Tit. 25:2503.01, 2501.02; Tit. 23:2301.01, Tit. 21: 2101.02, Tit. 19:1901.06, Tit. 19:1907.051 Police Court Judge:"acting police court judge" chosen by mayor, shall be reputable member of the bar, or mayor himself. Tit. 19:1903.03	Police Judge has jurisdiction of any misdemeanor committed within municipal corporation. Tit. 19:1903.06	In felonies, Police Judge may have power of county court judge to hear case and discharge, recognize or commit. If upon hearing, judge finds only misdemeanor, he may entertain jurisdiction. Tit. 19:1903.07	
OKLAHOMA  County Courts and Justices of the Peace abolished; Powers and duties taken over by District Courts. Tit. 20 sec 91.1	Judges of Supreme, District, and Municipal Courts must be lawyers licensed by some court of record. Const. Art 7 secs 3, 9, 11; Title 11 sec 783			

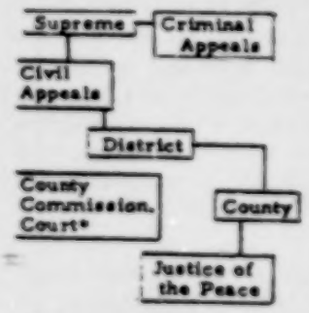
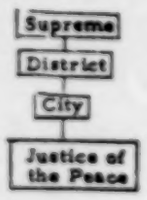
STATE AND COURT SYSTEM	Educational Qualifications of Judges Having Criminal Jurisdiction	CRIMINAL JURISDICTION OF NON-LAWYER JUDGES		
		Misdemeanors	Preliminary Hearings	Warrants
OREGON 	Supreme, Appellate, and Circuit Court Judges must be members of Oregon bar. Tit. 2 secs 540(2) & 020; Tit. 3 sec 050 District Court Judge must be local attorney, member of state bar, or in counties with population greater then 500,000, have held previous judicial office in that county. Tit. 46 sec 610 County Court and Justice of the Peace--no provision requiring legal education. Const. Art VI sec 8 Tit. 51 sec 240	Justice Courts have jurisdiction of theft, assault, etc. + misdemeanors up to $500 fine or 1 year in county jail or both EXCEPT in counties with district courts where misdemeanor jurisdiction is limited to 3 months in county jail or $100 fine or both. Tit. 51 secs 040, 050 County Courts have ONLY juvenile court jurisdiction in more then 12 counties. Tit. 46 sec 092 In other counties, juvenile court jurisdiction is the county court's only judicial function, but it also transacts county business and grants preliminary injunctions in suits in the circuit court. Tit. 5 sec 030	Justice of the Peace may hold preliminary hearing and may admit to bail. Tit. 135.070	County Judge and J. P. may issue arrest warrants. Tit. 133 secs 020, 030

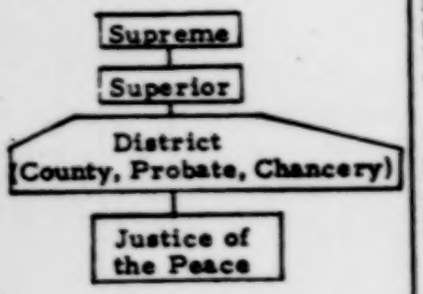
STATE AND COURT SYSTEM	Educational Qualifications of Judges Having Criminal Jurisdiction	CRIMINAL JURISDICTION OF NON-LAWYER JUDGES		
		Misdemeanors	Preliminary Hearings	Warrants
PENNSYLVANIA 	Judges of Supreme, Superior, Commonwealth, Common Pleas, Community, and Municipal Courts must be members of the bar of the Supreme Court. Const. Art 5 sec 12(a) Justice of the peace must be member of bar or must complete training course. Const. Art 5 sec 12(b)	J. P. may try any offense jurisdiction of which has not been granted to any other court. Specific misdemeanor jurisdiction is given to J. P. in Erie and in Union Counties. Tit. 42 secs 391, 392	J. P. may hold preliminary hearing. Tit. 42 sec 723 Bail is set by constable in Justice Court. Tit. 42 sec 422	J. P. may issue arrest warrants. Tit. 42 sec 422
RHODE ISLAND 	Supreme and Superior Ct. Judges--no provision requiring legal education. Tit. 8 sec 3-1 District Court Judge must be member of bar. Supp. Tit. 8 sec 8-3 Justice of the Peace may be member of bar OR qualified elector. Tit. 42 sec 30-5		Justices of the Peace who are members of state bar may take bail. Tit. 12 sec 10-2	Justices of the Peace appointed by chief judge of District Ct. may issue warrants for arrest... Tit. 12 sec 6-4 ...but NOT search warrants. Tit. 12 sec 10-2

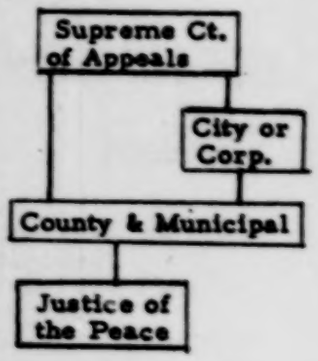
STATE AND COURT SYSTEM	Educational Qualifications of Judges Having Criminal Jurisdiction	CRIMINAL JURISDICTION OF NON-LAWYER JUDGES		
		Misdemeanors	Preliminary Hearings	Warrants
SOUTH CAROLINA  *Municipal Court Judge is mayor of city or intendant. Tit. 15 sec 901	Supreme, Circuit and County Court Judges must be attorneys-at-law. Const. Art V sec 10 Tit. 15 sec 605 Municipal Court Judge and Magistrate--no provision requiring legal education. Tit. 15 sec 901; Tit. 43 sec 1	Magistrate has jurisdiction of all offenses up to $100 fine or 30 days in prison, but NO criminal jurisdiction in county with county court. Tit. 43 secs 63 & 69 supplement Municipal Judge (Mayor or intendant) has powers of magistrate in criminal cases within his city or town. Tit. 15 sec 901	Clerks of courts grant bail except in Charleston County where magistrate sets amount of bail. Tit. 17 secs 301, 302	Magistrate may issue arrest warrant. Tit. 43 sec 111 Municipal Judge (mayor or intendant) has powers of magistrate, hence may issue arrest warrants. Tit. 15 sec 901

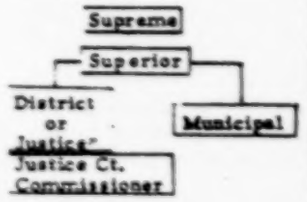
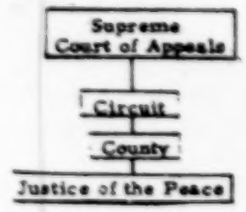
STATE AND COURT SYSTEM	Educational Qualifications of Judges Having Criminal Jurisdiction	CRIMINAL JURISDICTION OF NON-LAWYER JUDGES		
		Misdemeanors	Preliminary Hearings	Warrants
SOUTH DAKOTA  	Supreme Court Judge must be "learned in the law" which means attorney-at-law in S. D. according to Jamieson v. Wiggin (1899) 12 SD 16, 80 NW 137, 46 LRA 317, 76 AmSt. Rep 585. Const. Art 5 sec 10 Circuit and County Court Judges must be 'learned in the law" Const. Art 5 sec 25 and above citation. Municipal Court Judge must be attorney-at-law licensed in S. D. Tit. 16 sec 11-8 No provision requiring legal education for Justice of the Peace or Police Magistrate. Tit. 16 sec 12-2, Tit. 16 sec 12-17.2 supp.	Justices of the Peace have jurisdiction of misdemeanors where punishment is fine up to $100 or prison up to 30 days or both. Tit. 16 sec 12-9 Police Magistrate has same jurisdiction as Justice of the Peace. Tit. 16 sec 12-17	Justice of the Peace may hold preliminary hearing and admit to bail. Tit. 23 secs 54-3, 54-6 Police magistrate may hold preliminary hearing and may admit to bail. Tit. 16 sec 12-27	Justice of the Peace and Police Magistrate may issue arrest warrants. Tit. 23 sec 54-2; Tit. 16 sec 12-27

STATE AND COURT SYSTEM	Educational Qualifications of Judges Having Criminal Jurisdiction	CRIMINAL JURISDICTION OF NON-LAWYER JUDGES		
		Misdemeanors	Preliminary Hearings	Warrants
TENNESSEE 	Supreme, Appeals, Chancery, Circuit and Criminal Court Judges must be authorized to practice law in Tennessee. Tit. 17 sec 119 County Court judges who have criminal jurisdiction* may or may not be required to qualify as attorneys depending on population of county Tit. 17 sec 119 *Ct. of Gen'l Sessions of Cocke County, by private act, given limited concurrent jurisdiction with circuit & criminal courts--only example of criminal jurisdiction in county court see Tit. 16 sec 1709 (Peobate juris.) & Tit. 27 secs 202ff (Juvenile juris.) Justice of the Peace--no provision requiring legal education. Const. Art 6 sec 15	Justice of the Peace has jurisdiction to fine up to $50 for misdemeanor in case where defendant pleads guilty. Tit. 40 sec 407	Justice of the Peace may determine bail. Tit. 40 sec 406	Justice of the Peace may issue warrants. Tit. 19 sec 203

STATE AND COURT SYSTEM	Educational Qualifications of Judges Having Criminal Jurisdiction	CRIMINAL JURISDICTION OF NON-LAWYER JUDGES		
		Misdemeanors	Preliminary Hearings	Warrants
TEXAS  *has none of the functions of a court but is the general governing body of the county. Const. Art 5 sec 18 commentary	Supreme and Criminal and Civil Appeals Court Judges must be lawyers. Const. Art 5 secs 2, 4, 6 District Judge must be licensed to practice law in Texas. Const. Art 5 sec 7 County Court Judge must be "well informed in the law of the state." Const. Art 5 sec 15 see commentary: law license not required. Justice of the Peace-- no provision requiring legal education. Const. Art 5 sec 19	County Judges have jurisdiction of misdemeanors of which exclusive jurisdiction is not given to J. P. and when fine is over $200 UNLESS there is a criminal district court in the county. Const. Art 5 sec 16 & CCP Art 4.07 County Judges have appellate jurisdiction from Justice Court. CCP Art 4.08 Justices of the Peace have jurisdiction in criminal cases up to $200 fine. CCP Art 4.11 Const. Art 5 sec 19	Justice of the Peace may hold preliminary hearing and may fix bail. Const. Art 5 sec 19 & commentary CCP 45.16--45.18	Justice of the Peace may issue arrest warrants. Const. Art 5 sec 19 & commentary CCP Art 45.19
UTAH 	Supreme, District, and City Court Judges must be members of bar. Const. Art VIII secs 2, 5 Tit. 78 sec 4-8 Justice of the Peace--no provision requiring legal education. Tit. 17 sec 6-5	Justices of the Peace have jurisdiction of such misdemeanors as petit larceny, assault or battery, breach of peace, and all misdemeanors punishable by up to $300 fine or 6 months in prison or both. Tit. 78 sec 5-4* *June 1975 legislature amended Act giving defendant right to have attorney J.P. where there is option of imprisonment Utah House Bill #1, 1st Special Session 1975	Justice of the Peace may hold preliminary hearing and may admit to bail. Tit. 77 secs 15-3, 15-4	Justices of the Peace may issue arrest and search warrants. Tit. 77 secs 10-4, 10-5 and Tit. 77 sec 10-5 compilers notes.

STATE AND COURT SYSTEM	Educational Qualifications of Judges Having Criminal Jurisdiction	CRIMINAL JURISDICTION OF NON-LAWYER JUDGES		
		Misdemeanors	Preliminary Hearings	Warrants
VERMONT 	Supreme, Superior & District Court Judges must be practicing attorneys in Vermont. Tit. 4 Ch. 15 sec 602 No provision requiring legal education for Justice of the Peace. Tit. 4 ch. 11 sec 491	Justice of the Peace has no criminal jurisdiction (Tit. 4 ch. 11 sec 505 repealed as of July 1, 1972)		

STATE AND COURT SYSTEM	Educational Qualifications of Judges Having Criminal Jurisdiction	CRIMINAL JURISDICTION OF NON-LAWYER JUDGES		
		Misdemeanors	Preliminary Hearings	Warrants
VIRGINIA 	Supreme Court of Appeals, Circuit and City Court Judges must be practicing lawyers or have held judicial office in the U.S. Const. Art VI secs 91, 96, 99 Municipal Court Judge must be practicing lawyer in Va. in cities with population greater than 10,000. Tit. 16 secs 1-52, 1-53 In cities with population less than 10,000 non-lawyer judge may be appointed under certain circumstances. Tit. 16 secs 1-8, 1-9(supp.) 1-54, 1-55 County Judge may be non-lawyer under certain circumstances. Tit. 16 secs 1-8, 1-9 No provision for required legal education of Justice of the Peace. Tit. 39 sec 1-7; Const. Art VI sec 108	County & Municipal Court Judges have jurisdiction of all misdemeanors in county or corporate limits. Tit. 16 secs 1-123, 1-124	County & Municipal Judges may hold preliminary hearings and may admit to bail. Tit. 19 secs 1-110(b) & 1-112 Justice of the Peace may hold preliminary hearing in certain cases, and may admit to bail. Tit. 39 sec 1-15 Tit. 19 secs 1-106, 1-110(supp)	County & Municipal Court Judges may issue warrants. Tit. 16 sec 1-27 Justice of the Peace may issue warrants. Tit. 39 secs 1-15, 1-22

STATE AND COURT SYSTEM	Education. l Qualifications of Judges Having Criminal Jurisdiction	CRIMINAL JURISDICTION OF NON-LAWYER JUDGES: Misdemeanors	Preliminary Hearings	Warrants
WASHINGTON  *District Court • Justice Court; District Court Judge • Justice of the Peace. Tit. 3 sec 30.030	Supreme & Superior Court Judges must be admitted to practice in courts of Wash. Const. Art 4 sec 17 District Court Judge (and J. P.) must either be lawyer or have served as J. P. or municipal or police court judge, OR in districts with less than 10,000 population, he must have passed an examination provided by Supreme Court. Tit. 3 sec 34.060 BUT Justices of the Peace in cities of 5,000 or more must be attorneys. Tit. 3 sec 12.071 Justice Court Commissioner--no provision requiring legal education. Tit. 3 sec 42.010 Municipal Court Judge need not be lawyer in municipality with population of less than 5,000. Tit. 3 sec 50.040	Justices of the Peace have jurisdiction of all misdemeanors in their counties, within limitations. Tit. 3 sec 20.040	Justice of the Peace may hold preliminary examination. Tit. 10 sec 16.010 Tit. 10 sec 04.030 Municipal Court Judge may determine bail. Tit. 3 sec 50.210	Justice of the Peace may issue warrants Tit. 3 sec 28.020 Municipal Court Judge may issue arrest warrants. Tit. 3 sec 50.160
WEST VIRGINIA  	No provision requires legal education for Supreme Court of Appeals, Circuit Court, County Court Judges, or Justices of the Peace. Const. Art 8 secs 16,22,24	Justices of the Peace have jurisdiction of misdemeanors such as assault & battery, petit larceny, etc. Tit. 50 sec 18-1	Justice of the Peace may hold preliminary hearings and set bail. Tit. 50 sec 18-6	Justice of the Peace may issue arrest warrants. Tit. 50 sec 18-7

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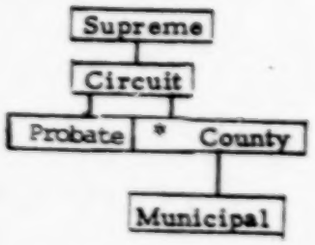
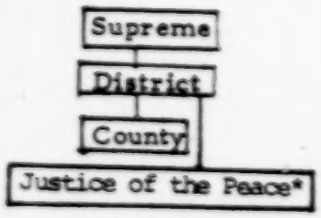
STATE AND COURT SYSTEM	Educational Qualifications of Judges Having Criminal Jurisdiction	CRIMINAL JURISDICTION OF NON-LAWYER JUDGES: Misdemeanors	Preliminary Hearings	Warrants
WISCONSIN  Justice of the Peace abolished. Const. Art 7 sec 15 repealed *County Court Judge acts as Probate Judge	Supreme Court and Circuit Court Judges must be licensed to practice law in Wisconsin. Const. Art 7 sec 24 supp. County Court Judge must be licensed to practice law in Wisconsin. W.S.A. 253.055 No provision requiring legal education for Municipal Court Judge. W.S.A. 254.01	Municipal Judge has no misdemeanor jurisdiction, but jurisdiction of city, town, or village ordinance violations. W.S.A. 254.045		Municipal Judge may issue warrants. W.S.A. 254.07
WYOMING  *abolished in counties with county courts Tit.5 sec 114.73 County Court system will become operative in 1975. Tit. 5 sec 114.77	Supreme and District Court Judges must be in actual practice of law. Const. Art 5 secs 8,12 County Court Judge must be authorized to practice law in Wyoming. Tit. 5 sec 114.14 Justice of the Peace may be authorized to practice law in Wyoming but if no qualified person has been elected to the office, a non-lawyer may be chosen by the county commissioners. Tit. 5 sec 99.2	Const. Art 5 sec 22, giving misdemeanor jurisdiction to Justice of the Peace, was repealed as of Jan. 17, 1967		Justice of the Peace may issue warrants. Tit. 7 sec 7-413

—33a—

Appendix "B"

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LARRY J. SHELMIDINE and JOHN F. REEVES, on their own behalf and on behalf of all others similarly situated in Salt Lake County, Utah, Plaintiffs, CHARLENE POLLY COOK, Intervening Plaintiff; vs. CHARLES A. JONES in his capacity as Justice of the Peace of Precinct 4 of Salt Lake County, Utah; LYNN D. BERNARD, RALPH CHILDS, LYLE GUNDERSON, WAYNE GUNDERSON, GERALDINE CHRISTENSEN, HENRY H. PRICE, WARREN D. COLE, REX C. CONRADSON, ELMAR L. JOHNSON, all in their capacity as Justices of the Peace for Precincts in Salt Lake County, Utah, Defendants.	MEMORANDUM DECISION Case No. 224948

Plaintiffs challenge the practice of permitting non-lawyer justices of the peace to hear misdemeanor cases in which a jail sentence could be imposed.[1] This challenge is founded upon three bases: That Due Process under the Fifth and Fourteenth Amendments of the United States Constitution requires that judges in criminal cases in which imprisonment may be imposed be lawyers; that the practice of permitting most of the justices of the peace

1 Section 78-5-4, Utah Code Annotated, provides that:
"Justices' courts have jurisdiction of the following public offenses committed within the respective counties in which such courts are established:
(1) Petty larceny.
(2) Assault or battery not charged to have been committed upon a public officer in the discharge of his duties or to have been committed with such intent as to render the act a felony.
(3) Breaches of the peace, committing a wilful injury to property, and all misdemeanors punishable by a fine less than $300 or by imprisonment in the county jail or municipal prison not exceeding six months or by both such fine and imprisonment."
Section 76-3-301 provides that a fine of $299 may be imposed upon a conviction of a Class B or C misdemeanor or infraction. Section 76-3-204 provides that the sentence for a Class B misdemeanor may be for a term of imprisonment not exceeding six months and for a Class C misdemeanor for a term not exceeding 90 days. Under Section 76-3-205, no person convicted of an infraction may be imprisoned.

throughout the state to be non-lawyers while at the same time requiring that judges of the city courts, whose jurisdiction is the same as the justice courts with regard to this type of offense, be lawyers, constitutes a denial of equal protection under the Fourteenth Amendment of the Constitution of the United States; that the right to counsel and, more fundamentally, the right to a fair trial, mandated by the Sixth and Fourteenth Amendments of the Federal Constitution are abridged and denied by allowing non-lawyer or lay judges to preside in any criminal case in which a jail sentence may be imposed.

By virtue of the foregoing assertions, plaintiffs are asking this Court to prohibit the defendants, each of whom is a non-lawyer or lay justice of the peace, from hearing cases involving the plaintiffs in which each plaintiff is charged with the commission of a misdemeanor offense, the conviction of which could result in imprisonment.[2] Both plaintiffs and defendants have moved for summary judgment and, to that end, have stipulated that

2 Plaintiffs Shelmidine and Reeves are charged with the crime of driving under the influence of intoxicating liquor, as is intervening plaintiff Cook, in violation of Section 41-6-44. This is a Class B misdemeanor.

there are no material facts in dispute. Those stipulated facts are more fully set out in the memoranda filed by the respective parties with two minor exceptions noted in the record during oral argument, about which there is likewise no dispute which raises any issue of fact.

Justice of the peace courts in Utah, manned by non-lawyer judges, are courts of convenience, particularly in isolated rural areas typical of most of this state in which there are few, and sometimes no attorneys. In the early days of statehood there were so few attorneys and such great distances to be covered by those attorneys who were available that the system of justice in dealing with minor criminal offenses would have broken down completely if lawyer judges had been required. Thus, while city court, district court and Supreme Court judges were, from the inception of statehood and before, required to be lawyers, both the Constitution of the state of Utah and legislative enactment left open the question of qualifications of the judges of justice courts with respect to legal background and training.

Modern transportation and communication have considerably alleviated much of the problem earlier encountered in effectuating a viable means of administering effective and speedy justice on the misdemeanor level. Nevertheless, of the 29 counties in Utah there are still eight counties with two or less resident attorneys and five counties with no resident attorney, for lawyers, whose livelihood is dependent upon the services they are able to render to people, have tended to settle in the more populous regions of the state, requiring the inhabitants in

many areas to travel some considerable distance to obtain legal counsel. The impact of this on the administration of misdemeanor offenses -- the very type of offense with which a limited-jurisdiction, lay justice of the peace most frequently deals -- is immediately apparent: One-third of the counties of the state do not have enough resident lawyers to staff the justice courts and still have a prosecutor and defense counsel. In Salt Lake County, where the heaviest concentration of lawyers is found, only one justice court judge is a lawyer.

With this background, the question before this Court is whether the historically convenient and necessary lay justice of the peace system in Utah can withstand the developing mandates of Due Process, of fundamental fairness and of equal protection. The basic predicate is not whether a lay justice of the peace can conduct an error-free trial or whether he is capable of being fair and impartial, for Due Process does not guarantee an error-free trial, Roberts vs. New York City 295 U.S. 264 S.Ct., L.Ed. 2d (1934), nor does this Court have any doubt that for the most part lay justices of the peace are fully capable of fairness and impartiality. Rather, it is whether a non-lawyer judge has sufficient legal training, background and experience to afford a misdemeanant a fair trial, the end result of which may be imprisonment. In this context, "fairness" does not mean merely impartiality. Its meaning is of constitutional necessity more encompassing. It alludes to a quality of justice which fully observes all rights, both substantive and procedural, of the citizen-defendant

who has been charged with an offense against the society in which he lives, no matter how petty. Ideally, one would hope for an entire judiciary staffed with learned judges who, by intellect and passion, are able to discern the delicate and subtle nuances extant in our constitutional system by which the rights of the individual are balanced against the power of the government. While the ideal may not be perfectly met, we come as close as humanly possible by imposing rigorous standards of training, background, experience and temperament on our judges to achieve the highest quality of justice possible. To impose less than that does not meet the fundamental constitutional requirements of Due Process for a constitutionally fair trial where loss of liberty is a possible consequence. Due Process permits no compromise between fundamental rights on the one hand and convenience or necessity on the other.

If one is entitled, under the growing concepts of Due Process and fair trial, to legal counsel in a misdemeanor case where there is a possibility of imprisonment, Argersinger vs. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed. 2d 530 (1972), see also Gideon vs. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963), then Due Process, the right to a fair trial and the right to counsel likewise mandate that under such circumstances only a lawyer-judge, qualified by training, background and experience to comprehend and utilize counsel's legal arguments, can impose a sentence of imprisonment, Gordon vs. Justice Court, 115 Cal. Rptr. 632, 12 Cal. 3d 323, 525 P.2d 72 (1974), cert. den. 16 Cr.L. 1483, 1484 (1975).

— // The defendants nevertheless argue that the "two-tiered" system in Utah of de novo appeals meets the

requirements of Due Process, if only after and by virtue of an appeal "anew" to a lawyer judge, and thus saves the system from any constitutional infirmity. But must a defendant incur the added expense, both in time and money, of an appeal in order to be afforded Due Process? I think not. The availability of a trial de novo on appeal does not guarantee a fair trial in the justice court, the court with which we are here dealing. Plaintiffs are entitled to Due Process and a fair trial in the first instance. Ward vs. Village of Monroeville, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed. 2d 267 (1972). // —

This Court therefore finds and holds that the practice under Utah law which allows non-lawyer or lay justices of the peace to impose a jail sentence or imprisonment constitutes a denial of a criminal defendant's right to a fair trial in violation of the mandate of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. To the extent that Section 78-5-4, Utah Code Annotated, authorizes lay justices of the peace to impose imprisonment, it, too, is violative of the guarantees under the Federal Constitution of Due Process, of the right to fair trial and of the right to counsel, and is void.[3]

Accordingly, defendants' motion for summary judgment is denied, plaintiffs' motion for summary judgment is partially[4] granted, and the defendants are prohibited

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[3] It is unnecessary to address the question of whether a lay judge can impose a fine since the only matter presently before this Court is whether a lay judge can affect the "liberty" of a defendant by imprisonment.

[4] It is granted "partially" because, while the plaintiffs seek to have this Court prohibit the defendants from hearing any criminal matter which may result in imprisonment, this decision only goes so far as to prohibit the defendants from imposing imprisonment.

as lay judges from imposing imprisonment or jail sentence upon a conviction of the offenses over which they otherwise have jurisdiction. Counsel for the plaintiffs are directed to prepare and submit an Extraordinary Writ in the nature of prohibition in accordance with this memorandum decision.

Dated this 3rd day of June, 1975.

BY THE COURT:

Stewart M. Hanson, Jr.
District Judge

SMH:/rgp

ATTEST:
[illegible] CLERK
BY _____
Deputy Clerk

Supreme Court, U. S.
FILED
SEP 8 1975
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1409

LONNIE NORTH,

Appellant,

v.

C. B. RUSSELL, *et al.*,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

BRIEF OF AMICUS CURIAE NEW YORK STATE ASSOCIATION OF MAGISTRATES

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In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1409

LONNIE NORTH,

Appellant,

v.

C. B. RUSSELL, *et al.*,

Appellees.

ON APPEAL FROM THE
COURT OF APPEALS OF KENTUCKY

BRIEF OF AMICUS CURIAE NEW YORK STATE ASSOCIATION OF MAGISTRATES

Interest of Amicus Curiae

This Court, largely on the basis of a record involving a wholly untutored nonlawyer judge, has been asked to indict literally thousands of hard working and competent nonlawyer judges throughout the nation. In addition, the Court is asked to sign the death warrant for a substantial portion of our judicial system, founded upon the rock of history and tempered by the demands of our present day criminal justice system. In some states, perhaps, rapid progress should be required in terms of training

and educating nonlawyers to more knowledgeably preside over proceedings involving petty criminal and traffic offenses. However, as we shall demonstrate, adequately trained and educated nonlawyers are perfectly capable of presiding in such proceedings.

This amicus curiae brief is filed on behalf of the New York State Association of Magistrates upon the consent of the attorneys for the respective parties in this appeal.[1] The Association of Magistrates' membership exceeds 2,000 and includes most of the incumbent town and village nonlawyer justices in the State of New York. The Association has intervened in three lawsuits initiated in the New York Supreme Court in which judgments were or are being sought declaring invalid the state constitutional and statutory provisions which authorize nonlawyers to preside in town and village justice courts.[2] One of those suits resulted in a judgment upholding the state laws.[3] The other lawsuits have been stayed pending an authoritative appellate determination.[4]

The question presented in the New York lawsuits is whether a criminal defendant's rights to counsel, due process and equal protection of the law are violated *per se* where a presiding town or village justice is not a lawyer and a jail sentence may be imposed upon conviction. The question presented in this appeal, however, is whether the individual nonlawyer judge is sufficiently educated, trained and experienced to preside over

[1] Letters of consent have been filed with the Clerk of the Court.

[2] *See* Appendix A, *infra*, where we have set forth the relevant New York provisions of law.

[3] *Joseph W.* (*Anonymous*) v. *Burnham*, Onondaga County Index No. 75-1291.

[4] *Wyse* v. *Johnson*, Steuben County Index No. 74-34986, and *Sanchez* v. *Tonkin*, Monroe County Index No. 75-8395.

fundamentally fair criminal proceedings (7-8).[5] As with lawyer judges, the competency of trained and certified nonlawyer judges should be ascertained on a case by case basis when that competency is challenged.

The interest of the New York State Association of Magistrates, therefore, lies in educating this Court on the superior quality of justice dispensed by properly educated and trained nonlawyer judges in local courts. Toward that end, we hope to avert a decision in this case which would indiscriminately entomb nonlawyer judgeships regardless of effective state supervised training programs.

Questions Presented

1. Whether nonlawyer judges properly trained, educated and certified by the state are capable of presiding over fundamentally fair criminal proceedings.

2. Whether constitutional questions addressed to the competency of nonlawyer judges should be determined by a *per se* rule of incompetency or in a case by case manner as an integral part of the criminal proceedings.

3. Whether a law school education and admission to the bar in itself qualifies an individual to preside in a criminal court.

[5] Numbers in parentheses refer to the Appendix filed by the appellant North. *Cf.* Brief of Amicus Curiae Kentucky Bar Association at 8.

Statement of Case

On July 10, 1974 Lonnie North was detained by a City of Lynch police officer pursuant to an arrest warrant issued in Cumberland City, Kentucky (34). North was charged in Cumberland with reckless driving. He apparently plead guilty and paid a fine (34).

Upon his return to Lynch, which is a fifth class city in Kentucky, North was held on another arrest warrant. The Lynch warrant was in connection with a charge of driving while intoxicated (25, 43, 45). He was taken before the appellee, C. B. Russell, Judge of the City Court of Lynch, and informed of the charge against him (45). There exists a fact question as to whether Judge Russell advised North of his rights to counsel, to confront his accusers and to introduce evidence on his own behalf (32, 37, 38-39, 45-46).[6]

Judge Russell was initially disposed to give North a jury trial (36). However, after consulting with the city attorney, who was stipulated to be a competent practicing attorney and a member of the Kentucky Bar Association (31), Judge Russell advised North that there would be no jury trial (32, 37). Sworn testimony had been previously taken from the complaining police officer, and North had been given an opportunity to cross examine the officer (27). The court had before it the results from a breathelizer test given to North (24).

North was not represented by a lawyer, despite the probability that Judge Russell advised him of his right to counsel (32). Moreover, it cannot be seriously disputed that North was given an opportunity to examine the only prosecution witness (27). North freely admitted that he had no witnesses to produce on his own behalf (42). Further, one of North's own witnesses at this habeas corpus proceeding, who had been present during the proceedings before Judge Russell, testified that Judge Russell gave North an opportunity to explain his side of the case (43). There is no record evidence that North was

[6]This factual issue was not resolved by the state courts due to the nature of the claim advanced by North in this habeas corpus proceeding (66).

affirmatively denied the opportunity to present his case; he simply chose not to advance any defense other than his not guilty plea (41). Although the testimony was obviously evasive, there is reason to believe North and his brother-in-law, Terry Creech, had both been in court for similar charges on several occasions (48-50).

Concededly, these proceedings were rough hewn in the realm of preserving constitutional rights. What the record discloses, however, is that elements of basic fairness did exist in Judge Russell's courtroom. The allegations in this habeas corpus proceeding, which has supplanted a direct appeal and a trial *de novo* in the Kentucky court system, are essentially negative. Thus, North alleges that Judge Russell did not advise him of his constitutional rights. However, with the possible exception of preserving North's right to a jury trial, the record discloses no affirmative violation of North's constitutional rights.

The problem with which the Court must cope in this case is whether a nonlawyer judge may be permitted, as was Judge Russell, to preside over criminal proceedings without any training or education by the state. Unlike Kentucky, which apparently furnishes no such training, New York, and a vast majority of the other states employing nonlawyer judges, maintain demanding training programs for nonlawyer judges who preside in town and village justice courts or their equivalent.[7]

The Kentucky situation, which is mitigated by the availability of a trial *de novo* before a lawyer judge, is not typical of the majority of the states which have retained the nonlawyer segments of their judiciary. This amicus brief is submitted to assist the Court in ascertaining the positive aspects of a properly trained nonlawyer judiciary in the local courts.

[7]In Appendix C, *infra*, we have presented the results of an August, 1975 telephone survey conducted by counsel for this amicus curiae which sets forth to the extent possible a review of the various training programs maintained by the states employing nowlawyer judges in their lowest level courts.

ARGUMENT

POINT I

Nonlawyer judges, properly trained and certified by the State, are capable of presiding over fundamentally fair criminal proceedings in town and village justice courts.

For a number of years, New York has administered comprehensive mandatory courses of training and education for its nonlawyer justices in town and village courts.[8] The result has been a successful merger of proper training and free election of nonlawyers to serve as judges in New York's 1,500 towns and villages.[9] Illustrative of the competent manner in which these judges conduct criminal proceedings are the few reversals of their judgments by New York's appellate courts. More particularly, the records of the three major lawsuits brought in New York seeking to invalidate New York's constitutional and statutory provisions for nonlawyer justices argue forcefully in favor of the New York system.

In *Joseph W. (Anonymous)* v. *Burnham*,[10] a sixteen-year-old youth was charged with the misdemeanor of driving while intoxicated and two traffic infractions. He was accorded every basic constitutional and statutory right in impeccable

[8]These courses are administered by the Administrative Board of New York's Judicial Conference, the body charged with the administration of all the state courts in New York. *See* N.Y. Const., art. 6, §28; 22 NYCRR §30.6(a) and (b).

[9]There are 430 lawyer judges who preside in New York justice courts, generally in the more populous towns and villages. *See* Appendix B at B-1, B-2, *infra*.

[10]Onondaga County Supreme Court, Index No. 75-1291.

proceedings before a nonlawyer town justice.[11] It is undisputed that the plaintiff in the *Burnham* case appeared for arraignment, was advised of his right to counsel at all stages of the proceedings, and was in fact assigned a lawyer.

The youth and his lawyer subsequently appeared before Justice Burnham in chambers. He was arraigned with counsel and advised that under New York law he might be eligible for youthful offender treatment. Advised by his counsel to plead guilty, the boy was adjudged a youthful offender and sentenced to three years probation. The declaratory judgment action he had brought to challenge the validity of New York's laws authorizing nonlawyer justices resulted in a judgment upholding those provisions.

In *Wyse* v. *Johnson*[12] the petitioner Wyse was charged in a village court with harassment. Wyse assertedly followed his landlord into the village and accosted him in a corridor of a hospital at which the landlord worked. In front of several witnesses, Wyse threatened to kill the landlord and to destroy

[11]Justice Helen Burnham served for nine years as the court clerk while her husband, an attorney, presided in the town justice court. Upon his death, Justice Burnham was first appointed to fill the vacant judgeship and then elected in her own right. A state-licensed real estate broker for many years, Mrs. Burnham began her professional life by attending a business college and later took a legal secretarial course. She was employed for years as a legal secretary. In 1971 she attended the basic training course administered by the Administrative Board of New York's Judicial Conference. She passed the examination prepared by Board attorneys and was certified. She also attended a special seminar in 1971 geared to the Criminal Procedure Law which became effective in New York on September 1, 1971. Mrs. Burnham then attended and successfully completed the advanced training course required by the Administrative Board. She regularly returns for refresher courses.

[12]Steuben County Supreme Court, Index No. 74-34986.

his property.[13] Two days later, Wyse was arraigned on an information by the now retired nonlawyer Justice Leon Hopkins.[14] Wyse was advised of his rights and given an adjournment of one week to obtain a lawyer. Due to the severity of the allegations, and the fact that Wyse no longer had any significant ties to the community, Justice Hopkins set bail at $50. Before the next appearance date, Wyse had obtained the services of the Greater Up-State Legal Project, a publicly funded legal aid program.[15]

In *Sanchez* v. *Tonkin*[16] Sanchez was charged in a Steuben County town court with felonious criminal mischief, later reduced to a misdemeanor. Sanchez literally destroyed the property he had rented from the complainant with an ax and a machete. He was arrested and arraigned on Tuesday, May 6th,

[13]Contrary to the suggestion in the amicus curiae brief filed in this appeal by the Greater Up-State Legal Project, there exists no first amendment issue in the *Wyse* case. Wyse has been charged with harassing his landlord by engaging in a course of *conduct* intended to harass, annoy or alarm him, pursuant to Penal Law, §240.25(5).

[14]On April 1, 1975 nonlawyer Justice John Johnson succeeded Justice Hopkins. He has been substituted as the named respondent in the Article 78 proceeding initiated by Wyse. Justice Hopkins successfully completed the state's basic and advanced training courses. He attended a special seminar at Cornell University in 1971 on the Criminal Procedure Law, and attended special traffic law seminars run by the American Bar Association at Harper College and the State University of New York at Binghamton. Justice Johnson, a businessman in Hornell, New York, has also successfully completed the state's basic training course and has been properly certified. He is scheduled to attend the next advanced course.

[15]The criminal proceedings in *Wyse* have been stayed pending the outcome of the civil litigation. That proceeding has in turn been stayed pending a determination in the *Burnham* appeal, now pending in the New York Court of Appeals, and a decision in the present appeal.

[16]Monroe County Supreme Court, Index No. 75-8395.

before the nearest sitting village justice.[17] The felony complaint, which had initially been filed before Justice Tonkin in a town court, was removed to the village court pursuant to New York's Criminal Procedure Law, §180.20(2).

On May 8th, only two days after his arrest, Sanchez was assigned counsel and re-arraigned. He was held on $5,000 bail while several outstanding arrest warrants were checked by law enforcement authorities. On Friday, May 9th, Sanchez was given a preliminary hearing, after which the felony charge was dismissed. The felony complaint was converted to a misdemeanor information pursuant to Criminal Procedure Law, §180.50(3) (iii).

On Monday, May 12th, Sanchez was released from custody and his case was adjourned in contemplation of dismissal.[18] Within a span of six short days, therefore, Sanchez was arrested, arraigned, assigned counsel, given a preliminary hearing, had the felony charge dismissed, and was given an adjournment in contemplation of dismissal on the misdemeanor charge.

Subsequently, however, Sanchez was arrested on a charge of harassment, which in New York is not a crime. It is that harassment charge now pending in the town court which has given rise to the civil action brought by the same attorneys representing Wyse. In the harassment case, Sanchez allegedly threatened to hit his landlady, with vile language and in a way that seriously alarmed her. Sanchez was arraigned on the harassment charge and advised of all of his rights by nonlawyer

[17]The village justice, Francis W. Bierwiler, Jr., in addition to being certified by the state, was a state police officer for almost ten years until multiple sclerosis forced his retirement. His numerous court appearances and special training regarding New York's criminal law has certainly enhanced his ability to preside as the village justice.

[18]Pursuant to Criminal Procedure Law, §170.55.

Justice William Tonkin. Counsel has been assigned, but the civil action has stayed all further proceedings in the town court pending resolution of the civil action.[19]

We have discussed these cases in some detail to give the Court the factual background necessary to understanding the triviality of the complaints in these lawsuits. The plaintiffs in the New York lawsuits have been forced to advance a *per se* theory of incompetence because the nonlawyer justices in those cases have flawlessly presided over the underlying criminal proceedings.

The reason these New York nonlawyer justices have performed so well is the basic and advanced training courses which they must attend, as well as additional special topic seminars presented on a regular basis. These intensive courses deal solely with the New York law which governs their cases.

For example, at the basic training program given at several universities throughout the state three times a year, the nonlawyers are given intensive and highly specific instruction on the use of the law library, the Penal Law and the Vehicle and Traffic Law, the Criminal Procedure Law, including Vehicle and Traffic Law procedural matters, evidence, and constitutional law.[20] This instruction constitutes more than 50% of the intensive course on New York law. We cannot overemphasize that the classes are designed to teach the law relating to those specific matters which arise in justice courts.

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[19]Justice Tonkin has been a town judge for seven years. He was initially certified by the Administrative Board after successfully completing the Board's basic training course in 1968. He then completed the advanced course and was certified at that level. He has twice attended the advanced course voluntarily as refresher courses. In addition, he has attended special classes administered by the Board on the new Penal Law and Criminal Procedure Law. Justice Tonkin is a process engineer who has been active in industrial management for 30 years.

[20]*See Sanchez* v. *Tonkin*, Monroe County Index No. 75-8395, Intervenor New York State Association of Magistrates' Exhibit XIII.

The intensive advanced course includes a lecture on recent developments in the Vehicle and Traffic Law,[21] instruction on pretrial motion procedures (including suppression motions and hearings), a thorough vascar and radar demonstration by experts, instruction on youthful offender procedures, sentencing and bail provisions, and post judgment remedies.[22] In addition, special two-day trial demonstrations and evidence seminars are regularly administered by the Board.

New York's courses are continually revamped and updated. They are presented to the nonlawyer justices by law professors and practicing lawyers who are particularly skilled and experienced at their assigned subjects. Hundreds upon hundreds of these nonlawyer judges return on an annual basis for refresher courses.

At the conclusion of each of these classes, the nonlawyer justices are required to take and pass an examination which is difficult, specific and relates primarily to criminal cases. The actual subject matter of the examination necessarily constitutes only a portion of the legal materials which the justices are taught and must be prepared to apply on the examination. A passing grade of at least 70 is required. Nonlawyer justices are not permitted to perform their duties if they do not successfully complete these courses. *See Bartlett* v. *Bedient*, A.D.2d , 366 N.Y.S. 2d 735 (4th Dept., April 23, 1975). The certification process of nonlawyer justices in New York is hardly a perfunctory process. Rather, the state takes very seriously the training of its nonlawyer justices.[23]

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[21]Emphasis on the Vehicle and Traffic Law is dictated by the fact that 90% of the cases occurring in the town and village courts are traffic violations of various kinds. *See* Appendix B at B-1, *infra*.

[22]*See* note 20, *supra*, Exhibit XIV.

[23]Appendix C, *infra*, demonstrates that many other state programs are comparable to or even more extensive than New York's program. Only three states, Arizona, Arkansas and Kentucky, lack specific training programs for nonlawyer judges who preside over cases involving potential jail sentences.

A brief word about the material distributed to the nonlawyer justices at the prescribed New York courses is in order. Every year the materials prepared by lawyers for the Administrative Board are updated and critical appellate decisions are included in the lectures and course materials. Other information obtained from designated state agencies is also made available. For example, manuals prepared by the Department of State, the Department of Agriculture and Markets, the Department of Audit and Control, and the Department of Motor Vehicles, are distributed. When these publications become partially outdated, the relevant revisions and deletions are effected during the course lectures.

In addition, a book entitled *Manual of Procedure for Town and Village Courts of New York State*, by Eugene W. Salisbury, comprehensively analyzes the Criminal Procedure Law, is supplemented annually, and is made available to all town and village justices. A book on evidence, designed for nonlawyer judges, has been published by the National College of the State Judiciary with the use of federal funds.[24] The evidence book is annotated for New York by Professor Robert Barker of Albany Law School. This evidence text has already been used and distributed in five state-administered seminars for nonlawyer judges in New York. The book will be distributed to all judges in the state. Finally, a practice manual on the subject of search and seizure, by Michael J. Brown, Esq., is also made available to each town and village justice in the state.

Further demonstrating the fact that admission to the bar does not in itself prepare an individual to preside over criminal cases[25]

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[24]E. Gardner Brownlee, *Objections to Evidence* (National College of the State Judiciary, 1974). Judge Brownlee presides in the District Court for Missoula, Montana.

[25]*See* Point III, *infra*.

is the Administrative Board's course for newly elected or appointed lawyer judges in the city, county, surrogate, family, and supreme courts. It has been the Board's experience over the past twelve years that most new judges in those courts have been civil practitioners with little or no experience in the criminal law. Thus, approximately 50% of the course deals with substantive criminal law, criminal procedure, revisions of the mental hygiene law, and rules of evidence.[26]

In its amicus brief in this Court, the Greater Up-State Legal Project suggests that the flexibility allowed the justices attending these courses to miss what amounts to one day of classes impairs the effectiveness of the whole program. Actually, the number of justices who are unable to attend every session of the courses is infinitesimal. Moreover, those who miss a session are not excused from their responsibility for knowing the material, and in fact are tested on it.

In another vein, an education level survey recently conducted by the New York State Association of Magistrates showed that 6% (approximately 120 of New York's 1,983 town and village nonlawyer justices) had completed the grade school level of education. Forty-seven percent (approximately 930) have at least a high school education; 28% (approximately 555) have an associate college degree; 8% (approximately 160) have a bachelor's degree; 6% (approximately 120) have masters' degrees; and 2% (approximately 40) have Ph.D. degrees. The pronounced trend over recent years is a steady increase in the educational level of these nonlawyer justices.[27]

The Court is reminded that we are talking about judges who preside generally in rural communities to which young people

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[26]*Sanchez* v. *Tonkin*, Monroe County Index No. 75-8395, Intervenor New York State Association of Magistrates' Exhibit XII.

[27]*Id.*, Exhibit XV.

who go off to college seldom return. Thus, nonlawyer candidates for town and village justices are most often persons of prestige who have established themselves in their communities and who have developed reputations for fairness and the ability to comprehend the complexities of modern day criminal law. These judges usually possess a mixture of common sense, such as that referred to by Judge Russell (24). That quality is useful in presiding over the superabundance of minor traffic cases confronting the local judges.

Without intending to minimize the importance of the training given to New York's and other states' nonlawyer judges, it is fair to say that the awesome standards envisioned by the appellant and his supporters are based upon an unrealistic assessment of the actual practice and procedure required in those lower courts. While the appellant can point to categories of offenses involving relatively complex legal problems which hypothetically could arise in New York's town or village courts, or comparable courts in other states, the fact is that such complexities pertain to an extremely small percentage of cases encountered by a local judge in a small or rural community.[28]

Unquestionably, each person's right to due process should be safeguarded. But the critical question is whether it is necessary to provide a duly admitted attorney to preside over the matters which form the bulk of a town or village court's caseload. Clearly, such a result is not necessary where nonlawyers can be adequately trained to preserve fundamental fairness in the proceedings before them.

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[28]*See* Appendix B at B-1, B-2, *infra*. Moreover, errors of substance which may occur are reviewable upon appeal as a matter of right. Criminal Procedure Law, §450.10.

POINT II

The New York constitutional and statutory provisions require adequate training and education for the state's nonlawyer justices, and are constitutional on their face and as applied.

Pursuant to their powers under the tenth amendment, in New York the people adopted Article 6, §20(c) of the state constitution.[29] That section provides:

> "Qualifications for and restrictions upon the judges of district, town, village or city courts outside the city of New York other than such qualifications and restrictions specifically set forth in (a) of this section, shall be prescribed by the legislature, provided however, that the legislature shall require a course of training and education to be completed by justices of town and village courts selected after the effective date of this article and who have not been admitted to practice law in this state."[30]

There can be little doubt that the tenth amendment authorizes the state to develop its own court system. A state's principal responsibility under its police power is to enact "procedures for enforcing its laws." *Salsburg* v. *Maryland*, 346 U.S. 545, 550 (1954). Toward that end, New York State's constitution provides for a uniform court system consisting in part of nonlawyer judges. The jurisdiction of the latter is limited by Article 2 of the Uniform Justice Court Act to misdemeanors, petty offenses including traffic infractions,[31] and certain civil

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[29]This provision became effective on September 1, 1962 after being overwhelmingly approved by popular vote on November 7, 1961.

[30]Uniform Justice Court Act, §105(a), and Town Law, §31, implement the requirements of a prescribed course of training and education. *See* Appendix A, *infra*. Former Village Law, §4-416 was omitted when the Village Law was revised in 1972-1973. The legislature intended that §105(a) of the Uniform Justice Court Act should suffice for village justices.

[31]*See* Criminal Procedure Law, §1.20(39).

matters. The legislature's power under the state constitution to prescribe the parameters of justice court proceedings cannot be disputed. *People* v. *Felberbaum*, 9 N.Y.2d 213, 173 N.E.2d 783 (1961).

In *Fay* v. *New York*, 332 U.S. 261 (1947), this Court upheld New York's "special" jury system writing:

> "The function of the . . . Fourteenth Amendment . . . is not to prescribe procedures but is essentially to protect the integrity of the trial process by any method the state sees fit to employ . . . . [Courts] must be organized to hear, try and determine on the evidence and the law. But beyond requiring conformity to standards of fundamental fairness, that have won legal recognition, this Court has been careful not so to interpret this Amendment as to impose uniform procedures upon the several states whose legal systems stem from diverse sources of law and reflect different historical influences." (332 U.S. at 294)

In *Fay* this Court, acknowledging the states' power to organize their own court systems, wrote further:

> "We adhere to this policy of self-restraint and will not use this great centralizing Amendment to standardize administration of justice and stagnate local variations and practice." (332 U.S. at 295)

Although addressing itself to the "special" jury system in New York City, the Court's language clearly extends to the state's power to provide a judicial system which includes nonlawyer judges.[32] A constitutionally necessary ingredient in

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[32] In response to our reference to the *Fay* decision in *Wyse* v. *Johnson*, Steuben County Index No. 74-34986, the petitioner suggested that *Taylor* v. *Louisiana*, U.S. , 95 S.Ct. 692 (1975), had overruled the *Fay* decision. However, in *Taylor* this Court expressly reaffirmed its earlier decision in *Fay* by stating:

> "It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community, we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition, *Fay* v. *New York*, 332 U.S. 261, 284 . . . (1974); . . . ." (95 S.Ct. at 702)

the judicial system is the availability of a fundamentally fair trial. The allegation that a properly trained and certified nonlawyer cannot preside over a fundamentally fair trial is simply that — an allegation. The mere statement that a nonlawyer is not a competent judge does not make the nonlawyer in fact an incompetent judge.

In *Shadwick* v. *City of Tampa*, 407 U. S. 345 (1972), the Court rejected a challenge similar to that advanced here and upheld the role of nonlawyer magistrates in issuing arrest warrants. Confronted with a claim that nonlawyers were incapable of determining whether probable cause existed, the Court wrote:

> ". . . he would be able to deduce from the facts on an affidavit before him whether there was probable cause . . . . Our legal system has long entrusted nonlawyers to evaluate more complex and significant factual data than that in the case at hand. Grand juries daily determine probable cause prior to rendering indictments, and trial juries assess whether guilt is proved beyond a reasonable doubt." (407 U.S. at 351-352)

The kinds of legal determinations a nonlawyer magistrate makes before issuing warrants are virtually synonymous with the great majority of legal questions decided in most justice court cases. For instance, a warrant may only be issued upon sufficient application showing probable cause. The magistrate must determine:

a. that the application and accompanying affidavit(s) comply with all statutory requirements as to form;[33]

b. that the actual description of persons, places and things is legally sufficient;

c. that the allegations of information source, if other than personal knowledge, are sufficiently stated to satisfy the legal requirements regarding affidavits (akin to laying a proper foundation);

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[33] *See, e.g.*, Criminal Procedure Law, §§120.10, 690.35 and 690.45.

d. that the allegations are properly in the affidavit and that they are not unidentified hearsay (akin to questions of admissibility);

e. that the allegations are not legally stale; and

f. that sufficient facts appear to demonstrate probable cause.

All of these decisions involve questions of law. Perhaps most fundamentally, the last requires a comprehensive knowledge of probable cause judicial decisions. The determination of probable cause is thought by many judges to be the most difficult question to regularly come before them. That concept is relevant to the issuance of warrants and to a determination to bind over a felony defendant for grand jury action on his case.[34]

Thus, the nonlawyer magistrate expressly approved by this Court is competent to find the required judicial decisions, read and comprehend them, and apply them on a case by case basis. In short, the Court has expressly recognized a nonlawyer's ability to think like a judge, to determine difficult legal questions, and to take action in a neutral detached manner which directly affects an individual's personal liberty.

Indeed, when a magistrate issues an arrest warrant, as in *Shadwick*, the result will always be an interruption of the defendant's personal liberty and may well involve a lengthy period of incarceration. An individual arrested on a nonlawyer magistrate's warrant, as approved in *Shadwick*, could conceivably spend more time in jail awaiting the disposition of his case than the period of incarceration authorized by statute in

[34]In New York, the Criminal Procedure Law, §180.60(8), uses the synonymous term "reasonable cause" in setting the standard for preliminary hearings and the concomitant determination whether or not to submit the matter to a grand jury.

almost 90% of the cases which come before a nonlawyer town or village justice in New York.[35]

The term "fundamental fairness" has been defined in numerous cases and universally focuses on rights basic to a fair trial. *See, e.g., In re Murchison*, 349 U.S. 133 (1955); *Powell* v. *Alabama*, 287 U.S. 45 (1932); *Helfrick* v. *Dahlstrom Metalic Door Co.*, 256 N.Y. 199 (1931), *aff'd*, 284 U.S. 594 (1931); *State University of New York* v. *Denton*, 35 A.D.2d 176, 316 N.Y.S.2d 297, 302-303 (4th Dept. 1970). In *Helfrick* the court wrote:

> "Unlike our own State Constitution, there is nothing in the Federal Constitution or the Acts of Congress, including the United States Judicial Code . . . , which requires judges of courts, federal or state, to be lawyers or admitted to practice." (256 N.Y. at 205)

In *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972), the Court held that "no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." (407 U.S. at 37.) However, as thoroughly as this Court reviewed the right to counsel in *Argersinger*, it never suggested that a nonlawyer judge, trained and certified by the state, was not competent to preside over criminal matters within his court's jurisdiction. *See*

[35]The amicus curiae Greater Up-State Legal Project has misstated this Court's holding in *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974). That case dealt with an ex parte writ issued to a creditor by a municipal judge ordering the sequestration of property *pending a hearing* at which the debtor could be heard. This Court upheld the Louisiana statutory procedure in question. In *Mitchell* the Court discriminated between an untrained clerk and a judge. In dictum the Court distinguished *Fuentes* v. *Shevin*, 407 U.S. 67 (1972). In *Fuentes* an untrained clerk, *without any judicial supervision*, was authorized by the state's replevin statute to issue a writ for the repossession of goods *without notice or the right to a hearing*. These cases involving state replevin statutes are totally inapposite here. Where nonlawyer judges are trained and certified, as in New York, they may hardly be considered untrained clerks.

also Ward v. *Village of Monroeville*, 409 U.S. 57 (1972), where the judge's lack of legal training was forcefully but unsuccessfully urged upon this Court as a ground for reversal.

Simply put, the competency of a particular presiding judge must be determined on a case by case basis whether the judge is a lawyer or a nonlawyer. Indeed, many lawyer judges make critical errors at trial which are corrected on appeal without labeling the trial judge incompetent. *Cf. Beck* v. *Washington*, 369 U.S. 541, 554-555 (1962).

Even lawyer judges often misunderstand or disagree with a defense lawyer's argument without denying a defendant the right to counsel. The constitution extends to a criminal defendant the right to the assistance of counsel. *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972). There is, however, no constitutional right to the *successful* assistance of counsel, which is the logical extension of the appellant's contention.

Presumption of Constitutionality

In attacking the validity of statutory and constitutional provisions which authorize nonlawyer justices to preside over criminal proceedings, a criminal defendant bears a heavy burden of overcoming the presumption in favor of their constitutionality. *San Antonio Independent School District* v. *Rodriguez*, 411 U.S.1 (1973); *Schilb* v. *Kuebel*, 404 U.S. 357 (1971); *McDonald* v. *Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969); *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Salsburg* v. *Maryland*, 346 U.S. 545 (1954); *Fay* v. *New York*, 332 U.S. 261 (1947); *Snyder* v. *Massachusetts*, 291 U.S. 97 (1934); *Graham* v. *West Virginia*, 224 U.S. 616 (1911); *Lindsley* v. *National Carbonic Gas Co.*, 220 U.S. 61 (1910); *Missouri* v. *Lewis*, 101 U.S. 22 (1879).

In *McDonald* the Court stated:

> "The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them." (394 U.S. at 809)[36]

Sixty percent of the states in this country do not require the judges of their lowest level courts to be lawyers.[37] This practice accords with Justice Brandeis' federalism theory frequently approved by this Court that each state is free to serve as a "laboratory" for the development of sound practices consonant with the fundamental fairness doctrine.[38] That concept is, of course, relevant because of the contention that the federal constitution supposedly bars a nonlawyer from presiding in a criminal case.

In *San Antonio Independent School District* the Court, noting the importance of education, examined the Texas statutory scheme for financing public education at the primary and secondary levels. The Court wrote:

> "... we think it plain that, in substance, the thrust of the Texas system is affirmative and reformatory and, therefore, should be scrutinized under judicial principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution. ... A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which

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[36]The *McDonald* decision upheld the Illinois absentee ballot statutory provision which excluded inmates of state correctional facilities.

[37]*See* Appendix C, *infra*.

[38]*New York State Ice Co.* v. *Liebmann*, 285 U.S. 262, 280 (1932), Brandeis, J., dissenting.

requires only that the State's system be shown to bear "some rational relationship to legitimate state purposes." (411 U.S. at 39, 40)

The Court declined to alter the Texas statutory scheme for funding its public schools, holding that the state system did not deny respondent due process of law. In that case, despite a showing of drastic disparity in financing among the state's school districts, the Court observed that the Texas statutory scheme was virtually identical to the school financing methods in effect in almost every other state. Similarly, New York's justice court system is similar to most of the other states' systems.

Further, a state may choose, as has Kentucky, to protect a defendant's rights by assuring him a trial *de novo* before a lawyer judge. *Colten* v. *Kentucky*, 407 U.S. 104 (1972). That protection is comparable to an appeal to an appellate court authorized to review the facts. The right to review, coupled with the limited jurisdiction of local courts presided over by adequately trained and certified nonlawyer judges is sufficiently affirmative and reformatory to come within the standards followed in the *San Antonio* case.

Constitutional challenges similar to those raised here have reached the appellate courts in other states and, except for the *Gordon* decision, *infra*, have generally been rejected. *See, e.g., Deck* v. *Hammer*, 7 Ariz. App. 466, 440 P.2d 1006 (1968); *State ex rel. Sellers* v. *Parker*, 87 Fla. 181, 100 So. 260 (1924); *City of Decatur* v. *Kushmer*, 43 Ill.2d 334, 253 N.E.2d 425 (1969); *Ditty* v. *Hampton*, 490 S.W.2d 772 (Ky.Ct.App. 1973), *appeal dismissed*, U.S. , 94 S. Ct. 219 (October 15, 1973); *Heard* v. *Moore*, 290 S.W.15 (Tenn. Sup. Ct. 1926); *Little* v. *State*, 75 Tex. 616, 12 S.W.965 (1890); *cf. People of the State of New York* v. *Wood*, 252 Supp. 270 (S.D.N.Y. 1966).

In New York, the Appellate Division, Fourth Department, has approved New York's constitutional provision authorizing nonlawyer town and village justices. In *In re Storace*, 30 A.D.2d 220, 291 N.Y.S.2d 416 (4th Dept. 1968), the court held that a nonlawyer could not preside as a "Justice of the Peace" for the City of Rome. That position, however, was in reality a city court judgeship for which N.Y. Const., art. 6, §20(a) specifically required an attorney.[39]

The California Supreme Court decision in *Gordon* v. *Justice Court*, 12 Cal.3d 323, 525 P.2d 72 (1974), *cert. denied sub nom. California* v. *Gordon*, 420 U.S. 938 (1975), relied upon by the appellant, is unsound and distinguishable on very substantial grounds. There the California court, with no factual support in the record, took notice of the supposed fact that there are more lawyers and better roads in that state today than there were in a period during which the town or village justice court system came into being in this country.

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[39]The appellate division wrote:

"It must be observed that, of the courts authorized by Article VI, §1 subd. a. to be part of the unified court system, the only groups which are not included among the courts whose judges must be attorneys by §20 are town and village courts outside the city of New York. Special legal training for justices of these latter courts who are not attorneys is mandated by subdivision c. of §20 which directs that the legislature 'shall require a course of training and education to be completed by justices of town and village courts selected after the effective date of this article who have not been admitted to practice law in this state.' Since, however, §20 subd. c. does not include justices within cities, such persons are exempt from the special training there prescribed. If respondent's construction of §20, subd. a. is accepted (by which the Rome justice court would not be included among city courts whose office holders must be admitted to practice in this state), city justice courts would be the only courts within the unified court system presided over by persons lacking any legal background or training and who could be less qualified than a justice of a town or village. We do not believe such a result was intended or contemplated, and no such construction should be adopted." (291 N.Y.S.2d at 418-419)

The California court, however, overlooked the fact that lawyers still do not *reside* in many rural areas of that state. Similarly, in New York residency in the jurisdiction is a principal requirement for holding a judgeship. *See* New York Public Officers Law, §3(1); Town Law, §23; Village Law, §3-300(2); *Landes* v. *Town of North Hempstead*, 20 N.Y.2d 417, 231 N.E.2d 120 (1967).[40] Even in those jurisdictions in New York where there are only a few lawyers, they are often unwilling or unable due to a conflict of interests to assume a judicial post.

For whatever reason, therefore, lawyers are simply unavailable to be judges in many of New York's towns and villages. We suspect the same is true in many states throughout the nation.[41] Thus, the facts *assumed* in *Gordon* are simply not true in New York and many other states. The people of New York and their elected representatives in the legislature have provided for trained nonlawyer justices to serve the judicial needs of a large part of the state where otherwise those needs would be virtually ignored. Those needs constitute a legitimate state purpose for enacting New York's constitutional and statutory provisions authorizing nonlawyer justices.

No Denial of Equal Protection of the Law

The appellant and his supporting amici curiae claim that a criminal defendant who appears before a nonlawyer judge in one jurisdiction, who would appear before a lawyer judge if the offense had been committed in another jurisdiction, is denied equal protection of the law. That contention is wholly without merit. First, all criminal defendants who appear in the nonlawyer judge's court are treated equally for purposes of the issue raised in this appeal. Moreover, since the appellant, and

[40]These statutory provisions may be found in Appendix A to this brief.

[41]*See* Appendix C, *infra*.

more particularly the criminal defendants in nonlawyer justice courts in New York, do not belong to a suspect class, for equal protection purposes they must demonstrate that there is no rational justification for the present classification of nonlawyer justices. Criminal defendants in New York nonlawyer justice courts cannot successfully urge such a contention.[42]

It is incontrovertible that approximately 90% of the cases handled in New York's town and village justice courts are vehicle and traffic cases.[43] While in *Gordon* the California court was dealing with only 232 justice of the peace courts, New York's pervasive system involves approximately 1,500 town and village justice courts and 1,983 nonlawyer justices.[44] In California the justice court system was optional and did not have

[42]The appellant's passing reference to *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), is badly misplaced. In *Shapiro* the Court struck down welfare residency laws which were calculated to deny indigents desperately needed welfare assistance simply "to protect the public fisc." Those statutes directly and adversely affected fundamental constitutional rights and were based upon purely arbitrary classifications. Here, however, the appellant can point to no fundamental right which was abridged solely because Judge Russell was not a lawyer. The only right which may have been violated — the right to a jury trial — would presumably have been abridged even if the Lynch City Attorney had been the City Judge.

Of special importance to this amicus curiae is the fact that in the New York lawsuits discussed above, there were no fundamental rights violated by the nonlawyer justices. The requirement in *Shapiro* that the state choose the least restrictive method of achieving the ends sought by the legislation is inapposite here. In any event, in New York and the overwhelming majority of the other states employing nonlawyer judges, the states have provided for extensive training of their nonlawyer judges and have limited the jurisdiction of their courts to minor offenses. The majority of states, therefore, have acted to protect fundamental rights and to save millions of dollars in providing a well trained nonlawyer judiciary to preside over petty offenses most of which are traffic matters.

[43]*See* Appendix B at B-1, *infra*.

[44]*See* Appendix B at B-8, *infra*.

to be adopted by the various counties. In New York and many of the other states, however, the justice court system is deeply ingrained in our judicial system.

If a district court plan were adopted in New York which assumed the *entire* caseload of the city, village and justice courts, and whose judges were all lawyers, the *annual* cost, excluding monies needed to construct new buildings and courtroom facilities, would be almost $70 million more than the cost of the present system.[45]

As the tables appended to this brief demonstrate, a requirement that town and village justices be lawyers, which could only be implemented by way of a state-wide district or circuit court system, would effectively reduce the number of local judges by approximately 1,300.[46] The resulting clogged calendars, tremendous inconvenience for litigants and intolerable expense would be catastrophic. Moreover, the district court system would prompt a purely computerlike treatment of the thousands of cases each of the reduced number of judges would have to handle. The lack of human understanding expected of judges by litigants who appear before them would severely diminish the quality of our judicial system. *Argersinger* v. *Hamlin*, 407 U.S. 25, 35-36 (1972).[47]

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[45] *See* Appendix B at B-3, B-4. These staggering costs are in sharp contrast to the $1.5 million in California expenditures suggested in the appendix to the amicus brief of the American Judicature Society.

[46] *See* Appendix B at B-4. The number of court locations would also be drastically reduced.

[47] Even if the "mandated district court counties" and "proposed town court counties" plan recommended by the Temporary Commission on the New York State Court System were adopted in New York, whereby district courts would be installed in only the 16 most populous counties in the state, that would not resolve the issue posed in this appeal. That proposal does not require the district courts to hear the traffic cases, many of which carry

(Footnote continued on following page.)

In reviewing the long history of nonlawyer justices and the vital role they have played in our judicial system, we are reminded of Justice Holmes' comment in *Jackman* v. *Rosenblaum Co.*, 260 U.S. 22, 31 (1922):

> "If a thing has been practiced for 200 years by common consent, it will need a strong case for the fourteenth amendment to affect it . . . ."

When it is considered that the federal constitution does not even require a United States Supreme Court Justice to be an attorney, the more stringent qualification urged by the appellant is all the more irreconcilable. For surely the members of the lowest level of our judiciary may not fairly be required to possess law degrees which are not demanded of the members of our highest tribunal.

The state laws authorizing the use of nonlawyers as town and village justices in New York are well within the boundaries of the fourteenth amendment. The fact that a nonlawyer presides in a given justice court does not in itself demonstrate a violation of fundamental constitutional rights.

(Footnote continued from preceding page.)

potential incarceration, and which comprise 90% of the justice court caseload. Those cases would still be heard in the town justice courts. *Cf.* Appendix B at B-6, B-7. As the New York Temporary Commission wrote in its publication . . . *And Justice for All* (January, 1973), at 27:

> "There should be town courts in all areas not served by district courts. Even where a district court is established continuance of the town court may be attractive for reasons of cost and accessibility . . . .
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> * * *
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> "The Commission believes that for certain matters accessibility outweighs the benefits of a full-time court and therefore recommends that the following subject matter be retained by town courts: petty offenses, traffic infractions and violations of law, civil actions to $500, and summary proceedings presently within the court's purview. Without legal accessibility, citizens might feel compelled to pay fines or avoid using the courts as a remedy because the long travel distances and amount of expenditures would not make it worthwhile."

Alternative Forms of Relief

In New York there exist adequate remedies for a criminal defendant tried before a town or village justice whom he alleges to be incompetent. First, the defendant may move in that court for the justice to disqualify himself. *People* v. *Bonnerwith*, 69 Misc.2d 516, 330 N.Y.S.2d 248 (Justice Ct., Town of Rhinebeck, Dutchess Co., 1972).

If that motion is denied, the defendant may move in the county court for the removal of his case to another court, based upon the disqualification of all of the judges of the court in which his case is pending. Criminal Procedure Law, §170.15(3)(a). If unsuccessful, the defendant may demand that a stenographer be employed at the municipality's expense and proceed to trial.[48] If convicted, the defendant may appeal the judgment upon a full stenographic record. Criminal Procedure Law, §§450.10. Moreover, if given a jail sentence the defendant may apply for bail pending his appeal, pursuant to Criminal Procedure Law, §460.50(2)(d).

Clearly, the *per se* theory advanced by the appellant and the criminal defendants in the New York lawsuits is an inappropriate vehicle to test the competency of local judges presiding over petty offenses.[49] Only case by case determinations would accommodate the state's legitimate interest in establishing judicial systems which include carefully trained nonlawyer judges. Where state legislation, such as that in New York, provides for the conventional airing of constitutional complaints, pursuit of those methods of relief should be required. The business of litigating asserted abstract constitutional

[48]Uniform Justice Court Act, §2021.

[49]*Sanchez* v. *Tonkin*, Monroe County Index No. 75-8395; *Joseph W. (Anonymous)* v. *Burnham*, Onondaga County Index No. 75-1291; and *Wyse* v. *Johnson*, Steuben County Index No. 74-34986.

violations is irreconcilable with the requirement that actual controversies must underlie judicial determinations. This Court should uphold the nonlawyer justice system where implemented with proper safeguards to insure fundamentally fair proceedings.

POINT III

A law school education and admission to the bar do not in themselves qualify an individual to preside in a criminal court.

In its amicus brief the Kentucky Bar Association suggests that we should resolve the growing difficulty of finding jobs for recent law graduates by placing them in the judgeships presently occupied by nonlawyers.[50] Perhaps where nonlawyer judges have had *no* legal training of any kind, that solution would have some merit. Law students are taught how to be analytical. And at first blush it may appear that law graduates admitted to practice are more competent than the state-trained nonlawyers to preside in criminal courts. For the following reasons, however, we believe that claim is largely illusory.

There are eleven accredited law schools in New York State. Only one (New York University) requires its students to pass a course in Criminal Procedure Law.[51] Most, but not all, of the law schools require an introductory constitutional law course. However, those courses deal overwhelmingly with constitutional principles applied in civil proceedings. Only five law schools require a class on evidence, and those courses do not deal with criminal law or criminal procedure, and certainly not with the

[50]Brief of Amicus Curiae Kentucky Bar Association at 13.

[51]The source of this information is a review of the bulletins of each of the eleven law schools and telephone discussions with a representative of the registrar's office of each of the law schools.

evidence article of the Criminal Procedure Law.[52] Ten of the eleven schools require a one semester course on criminal law or criminal justice, but none of the law schools have a course geared to the Vehicle and Traffic Law. The focal points of the legal training in our law schools are unquestionably commercial law and civil practice.

Although there may be elective courses which students may study, the *required* courses dealing with criminal law and criminal procedure, and related evidentiary and constitutional questions, hardly prepare a lawyer to preside over criminal cases in a justice court. Those basic courses, as any lawyer can substantiate, deal with legal theories and philosophies as they relate only generally to the area of criminal law and its role in controlling socially undesirable behavior.

Moreover, law students study from texts which are geared to no particular jurisdiction. The judicial decisions printed in such books only rarely involve New York statutes and New York courts. Indeed, in a typical text used for a basic criminal law course in New York, fewer than 10% of the cases were New York decisions. Rather, cases dealing with such generic topics as "criminal responsibility", "uncompleted criminal conduct", "misappropriation and related property offenses", ranged from Wyoming to Florida and Maine to Arizona.[53]

Similarly, in a typical text on evidence used in many New York law schools, only 5% of the cited decisions involve New York courts and New York rules of evidence.[54] None of those

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[52] *See* Criminal Procedure Law, art. 60.

[53] *See* Inbau and Sowle, *Cases and Comments on Criminal Justice* (Foundation Press, 1964). Both authors are professors at Northwestern University in Chicago, Illinois.

[54] *See* Sullivan and Hardin, *Evidence, Cases and Materials* (Foundation Press, 1968). Sullivan is a professor at Louisiana State University and Hardin is a professor at Duke University.

decisions involved a criminal matter. In a popular text used in the typical basic criminal procedure course, required merely at one law school in New York, only three significant decisions by a New York court were cited.[55] Moreover, that inaptly titled course is actually a hasty review of the Bill of Rights and related decisions by this Court. In short, there is no reference to the New York Criminal Procedure Law and nothing in the typical criminal procedure course which would prepare a lawyer to preside over a justice court criminal case. Further, those courses are routinely taught by professors who have little or no courtroom experience.

Nor does the bar examination adequately test a candidate's knowledge of criminal law, criminal procedure, constitutional law, or related rules of evidence. In the typical bar review course, only seven out of 160 hours are devoted to instruction in those areas of the law. Moreover, students from New York and out-of-state schools taking the bar review courses in New York are actually instructed that they need not be familiar with the Criminal Procedure Law.

And the bar examination itself deals only sparingly with these subjects. On the typical bar examination, only one essay out of twelve involves a question of criminal law, and then it is usually in conjunction with a constitutional law and evidentiary question. Similarly, out of the 160 "yes-no" type questions on the bar examination, at the most ten (6%) concern criminal law and even fewer relate to the rules of evidence.[56] For all intents and purposes, the bar examination does not test one's knowledge

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[55] *See* Hall and Kamisar, *Modern Criminal Procedure* (West, 1966). Hall is a professor at Harvard University and Kamisar is a professor at the University of Michigan.

[56] All of this information was derived from discussions with persons in charge of coordinating some of the principal bar review courses, and from counsel's personal recollection of the content of the bar examination.

of the Vehicle and Traffic Law. The pass-fail percentile varies from time to time, and in New York has been set as low as 45.[57]

In a revealing interview after the July, 1972 bar examination, the esteemed Chairman of the New York Board of Law Examiners, Arthur Karger, said that the essay questions on the test "are by far the most important part."[58] In response to criticism that only 8% of the essay questions relate to criminal law, Mr. Karger "replie[d] that criminal law is a small part of the profession . . . ." This same article sums up the attitudes toward the bar examination of some of the *successful* candidates in this fashion:

> ". . . it is an irrelevant test that measures nothing but the ability to memorize the legal trivia practicing lawyers look up as the occasion arises."[59]

Finally, Chief Justice Burger took stock of the lack of preparation law schools provide in the area of criminal law when he recently said:

> "While the district courts were trying to cope with the larger increase in cases, they were also trying to adjust to the infusion of this host of new lawyers, many of whom had had little experience in litigation and a minimum of training for the difficult and exacting task of prosecuting or defending a criminal case.
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> * * *
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> "The standards for selection in the tenure and compensation of these lawyers, on whom the system of justice must depend, should be made sufficiently attractive so that the federal courts will not continue to be used as a 'bush league' facility to train trial lawyers for private practice."[60]

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[57] *The New York Times*, Sunday, December 10, 1972, at 80.

[58] *Ibid.*

[59] *Ibid.*

[60] Chief Justice Burger, Annual Report on the State of the Judiciary, American Bar Association, Mid-Winter Meeting, February 23, 1975.

Conclusion

The question raised here is simple and straightforward. Is it necessary to have a lawyer judge to provide fundamentally fair proceedings involving petty criminal offenses? The appellant's eloquence notwithstanding, in fact the answer is no. Properly trained nonlawyers may safeguard a defendant's rights and fairly preside in a court of limited criminal jurisdiction.

This Court is urged to examine the entire national picture and to review the numerous judicial "laboratories" which prolifically produce competent nonlawyer judges. These various systems economically resolve difficult problems inherent in providing criminal justice in much of rural America. The prohibitive cost of converting to an all lawyer judiciary, with its concomitant reduction in individual attention in the local courts, strongly militates against any sweeping changes. That is particularly true where the constitutional complaints are advanced in the abstract with no real connection to fundamental fairness.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lawrence A. Schulz, one of counsel for the New York State Association of Magistrates, amicus curiae herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 4th day of September, 1975, I served on Hon. Ed W. Hancock, Attorney General of Kentucky, Capitol Building, Frankfort, Kentucky 40601, Hon. Wix Unthank, Commonwealth Attorney, Harlan, Kentucky 40831, Attorneys of Record for Appellees, C. B. Russell and Nathaniel "Trap" Helton; and Eugene Goss, Central Street, Harlan, Kentucky 40831 and Dean Hill Rivkin, 630 Maxwelton Court, Lexington, Kentucky 40508, Attorneys for Appellant, three copies each of this brief of amicus curiae, causing the same to be mailed, postage prepaid, to each of said attorneys.

Lawrence A. Schulz

Lawrence A. Schulz

APPENDIX

APPENDIX A

New York Constitutional and Statutory Provisions

N.Y. Const., art. 6, §20(c):

c. Qualifications for and restrictions upon the judges of district, town, village or city courts outside the city of New York, other than such qualifications and restrictions specifically set forth in subdivision a of this section, shall be prescribed by the legislature, provided, however, that the legislature shall require a course of training and education to be completed by justices of town and village courts selected after the effective date of this article who have not been admitted to practice law in this state.

N.Y. Const., art. 6, §28:

The authority and responsibility for the administrative supervision of the unified court system for the state shall be vested in the administrative board of the judicial conference. The administrative board shall consist of the chief judge of the court of appeals, as chairman, and the presiding justices of the appellate divisions of the four judicial departments. The administrative board, in consultation with the judicial conference, shall establish standards and administrative policies for general application throughout the state. The composition and functions of the judicial conference shall be as now or hereafter provided by law. In accordance with the standards and administrative policies established by the administrative board, the appellate divisions shall supervise the administration and operation of the courts in their respective departments.

Uniform Justice Court Act, §105(a):

(a) Training. No town or village justice selected for a term of office commencing on or after September first, nineteen hundred sixty-seven, except one who has been admitted to practice law in this state, shall assume the functions of his office unless he has

filed with the clerk of his municipality a certificate of completion of a course of education and training prescribed by the administrative board. The administrative board may issue a temporary certificate enabling a town or village justice to assume the functions of his office pending completion of the earliest such course available thereafter. Such certificates shall be in a form, and subject to terms and conditions, prescribed by the administrative board.

Town Law, §31 (3) and (4):

3. No town justice selected for a term of office commencing on or after September first, nineteen hundred sixty-seven, except one who has been admitted to practice law in this state, shall assume the functions of his office unless he has filed in the office of the town clerk a certificate of completion of a course of training prescribed by the administrative board of the judicial conference. The administrative board may issue a temporary certificate enabling a justice to assume the functions of his office pending completion of the earliest such course available thereafter. Such certificates shall be in a form, and subject to terms and conditions, prescribed by the administrative board.

4. Notwithstanding any other law, actual and necessary expenses incurred by a justice or justice elect in attending a course of training required of him before he can assume the functions of his office shall be a charge against the town.

Public Officers Law, §3(1):

1. No person shall be capable of holding a civil office who shall not, at the time he shall be chosen thereto, have attained the age of eighteen years, except that in the case of youth boards or youth commissions only, members of such boards or commissions may be under the age of eighteen years, but must have

attained the age of sixteen years on or before appointment to such youth board or commission, be a citizen of the United States, a resident of the state, and if it be a local office, a resident of the political subdivision or municipal corporation of the state for which he shall be chosen, or within which the electors electing him reside, or within which his official functions are required to be exercised, or who shall have been or shall be convicted of a violation of the selective draft act of the United States, enacted May eighteenth, nineteen hundred seventeen, or the acts amendatory or supplemental thereto, or of the federal selective training and service act of nineteen hundred forty or the acts amendatory thereof or supplemental thereto.

Town Law, §23:

Every elective officer of the town at the time of his election and throughout his term of office, shall be an elector of the town. Every other officer of the town at the time of his appointment and throughout his term of office shall be an elector of the town except that in towns having no resident attorney, the town attorney and such counsel as may be employed need not be electors and in towns having no resident engineer, the town engineer and such consultant engineers as may be employed need not be electors. No county treasurer, district superintendent of schools, or trustee of a school district shall be eligible to the office of supervisor.

Village Law, §3-300(2):

2. No person shall be eligible to be appointed to or to hold any other village office who: is not a citizen of the United States; is not at least eighteen years of age; except as may otherwise be provided by law, is not a village resident; and, if eligibility to or holding of such office is subject to regulation under the civil

service law or any other law, does not meet the requirements of such law or laws. Notwithstanding any other provisions of law to the contrary, the board of trustees of a village may provide, in lieu of any other residency requirement imposed by law, that any appointed village officer may reside within a county in which the village is wholly or partially situated.

APPENDIX

B-1

Distribution of Types of Cases in Town and Village Justice Courts, Calendar Year 1973, By County.[1]

	Traffic Offenses[a]	Misdemeanors	Civil Cases	Other State Offenses[b]
Albany	91%	6%	1%	1%
Allegany	90%	5%	3%	1%
Broome	94%	4%	1%	a
Cattaraugus	80%	11%	4%	4%
Cayuga	91%	6%	2%	a
Chautauqua	87%	8%	4%	a
Chemung	90%	7%	2%	a
Chenango	85%	6%	8%	a
Clinton	89%	7%	1%	2%
Columbia	92%	4%	2%	1%
Cortland	93%	5%	2%	a
Delaware	84%	9%	4%	3%
Dutchess	86%	7%	6%	1%
Erie	89%	7%	3%	a
Essex	87%	6%	3%	2%
Franklin	83%	9%	4%	2%
Fulton	85%	10%	2%	2%
Genesee	89%	6%	2%	a
Greene	89%	6%	3%	1%
Hamilton	80%	12%	2%	5%
Herkimer	90%	4%	4%	1%
Jefferson	85%	8%	5%	1%
Lewis	90%	4%	5%	1%
Livingston	87%	9%	1%	1%
Madison	94%	3%	2%	a
Monroe	89%	9%	1%	1%
Montgomery	92%	5%	2%	1%
Niagara	97%	8%	3%	1%
Oneida	91%	6%	2%	1%

B-2

Distribution of Types of Cases in Town and Village Justice Courts, Calendar Year 1973, By County.

	Traffic Offenses[a]	Misdemeanors	Civil Cases	Other State Offenses[b]
Onondaga	89%	7%	3%	1%
Ontario	84%	9%	5%	1%
Orange	89%	6%	3%	1%
Orleans	89%	8%	2%	a
Oswego	89%	6%	3%	1%
Otsego	89%	4%	4%	2%
Putnam	81%	10%	7%	1%
Rensselaer	89%	7%	1%	2%
Rockland	87%	6%	6%	1%
St. Lawrence	84%	8%	6%	1%
Saratoga	93%	4%	2%	1%
Schenectady	92%	5%	1%	1%
Schoharie	87%	7%	3%	2%
Schuyler	75%	16%	5%	4%
Seneca	90%	6%	2%	a
Steuben	80%	9%	9%	1%
Sullivan	82%	14%	2%	1%
Tioga	91%	5%	2%	a
Tompkins	88%	7%	2%	1%
Ulster	90%	7%	2%	1%
Warren	62%	9%	1%	3%
Washington	87%	9%	3%	1%
Wayne	84%	10%	4%	1%
Westchester	94%	2%	3%	a
Wyoming	87%	6%	4%	2%
Yates	90%	6%	2%	1%
New York State Average (excluding the New York City and Long Island counties)	89%	6%	3%	1%

a Vehicle and Traffic Law Titles I through VII, except Article 2-A, Title VII, §§1180, 1182, 1190 and 1192, Titles VIII through X. For purposes of this table, §1180 does not include speed limits established under §§1622-a, 1643, 1644, 1663 and 1670.

b Agriculture and Markets Law, Alcoholic Beverage Control Law, Banking Law, Civil Rights Law, Conservation Law, Correction Law, County Law, Domestic Relations Law, Education Law, General Business Law, Labor Law, Navigation Law, etc.

1 Analysis of Reports of Town Justices and Village Justices for the Year 1973, Justice Court Fund, New York State Department of Audit and Control, Albany, New York

B-3

Comparative Cost Analysis if the District Court System were Implemented Statewide in Contrast with Justice Court Costs — 1973 (Excluding Facilities, Equipment and Other Contractual Expenses)

County	Proposed Number of Justices Based on 1973 Caseload[2]	Proposed Justices Salaries ($30,000 per Annum)	Proposed Support Staff Per Justice (8 Staff Members at $6,250 per Annum, or $50,000 per Justice)	Total Proposed Personal Service Expense	1973 Number of Town and Village Justices	1973 Town and Village Justice and Support Staff Expenditures	Comparison of Commission Recommendation with Expense of Current Justice System Increase (+) Decrease (-)	Comparison of Commission Recommendation with Expense of Current Justice System - Per Capita Cost - Commission	Current System
Albany	15	$ 450,000	$ 750,000	$1,200,000	25	$ 139,230	$+1,060,770	$ 8.57	$ .69
Allegany	5	150,000	250,000	400,000	67	58,481	+ 341,519	8.60	1.25
Broome	19	570,000	950,000	1,520,000	38	145,822	+1,374,178	9.63	.82
Cattaraugus	6	180,000	300,000	480,000	71	77,991	+ 402,009	8.78	1.42
Cayuga	5	150,000	250,000	400,000	54	64,008	+ 335,992	9.33	1.49
Chautauqua	11	330,000	550,000	880,000	58	120,246	+ 759,754	9.70	1.32
Chemung	7	210,000	350,000	560,000	27	71,403	+ 488,597	9.09	1.15
Chenango	4	120,000	200,000	320,000	50	43,314	+ 276,686	8.52	1.15
Clinton	5	150,000	250,000	400,000	35	56,218	+ 343,782	7.37	1.03
Columbia	8	240,000	400,000	640,000	38	76,221	+ 563,779	15.03	1.79
Cortland	5	150,000	250,000	400,000	33	33,614	+ 366,386	15.22	1.27
Delaware	5	150,000	250,000	400,000	41	56,280	+ 343,720	8.94	1.25
Dutchess	16	480,000	800,000	1,280,000	48	175,310	+1,104,690	7.23	.89
Erie	48	1,440,000	2,400,000	3,840,000	63	586,609	+3,253,391	6.39	.97
Essex	5	150,000	250,000	550,000	37	100,064	+ 449,936	15.88	2.98
Franklin	6	180,000	300,000	480,000	41	78,949	+ 401,051	10.92	1.79
Fulton	3	90,000	150,000	240,000	22	29,709	+ 210,291	10.47	1.28
Genesee	7	210,000	350,000	560,000	30	72,906	+ 487,094	13.53	1.76
Greene	7	210,000	350,000	560,000	32	57,806	+ 502,394	16.90	1.73
Hamilton	1	30,000	50,000	80,000	19	28,320	+ 51,680	16.97	8.00
Herkimer	9	270,000	450,000	720,000	43	70,221	+ 649,779	11.99	1.17
Jefferson	8	240,000	400,000	640,000	56	87,127	+ 552,873	11.08	1.30
Lewis	3	90,000	150,000	240,000	40	31,274	+ 208,726	10.15	1.32
Livingston	7	210,000	350,000	560,000	41	76,922	+ 483,078	10.36	1.42

CONTINUED

B-4

Comparative Cost Analysis if the District Court System were Implemented Statewide in Contrast with Justice Court Costs — 1973 (Excluding Facilities, Equipment and Other Contractual Expenses)

Madison	11	$ 330,000	$ 550,000	$ 880,000	39	$ 65,736	$+ 814,264	$17.18		$1.28
Monroe	24	720,000	1,200,000	1,920,000	42	280,168	+ 1,639,832	4.60		.67
Montgomery	4	120,000	200,000	320,000	20	33,604	+ 286,396	10.50		1.10
Niagara	9	270,000	450,000	720,000	25	120,045	+ 599,955	6.11		1.35
Oneida	12	360,000	600,000	960,000	64	127,997	+ 832,003	7.31		.97
Onondaga	28	840,000	1,400,000	2,240,000	50	247,186	+ 1,992,814	8.12		.89
Orange	27	810,000	1,350,000	2,160,000	51	226,497	+1,933,503	13.17		1.38
Orleans	5	150,000	250,000	400,000	22	47,212	+ 352,788	10.72		1.26
Oswego	5	150,000	250,000	400,000	45	76,343	+ 323,657	6.06		1.15
Otsego	4	120,000	200,000	320,000	52	51,888	+ 268,112	7.98		1.29
Putnam	6	180,000	300,000	480,000	15	119,171	+ 360,829	8.46		2.10
Rensselaer	8	240,000	400,000	640,000	30	86,714	+ 553,286	8.05		1.09
Rockland	28	840,000	1,400,000	2,240,000	21	190,494	+ 2,049,506	9.74		.82
St. Lawrence	13	390,000	650,000	1,040,000	72	144,513	+ 895,487	10.67		1.48
Saratoga	13	390,000	650,000	1,040,000	42	101,090	+ 938,910	10.75		1.04
Schenectady	6	180,000	300,000	480,000	11	55,114	+ 424,886	5.77		.66
Schoharie	3	90,000	150,000	240,000	36	34,599	+ 205,401	9.69		1.39
Schuyler	2	60,000	100,000	160,000	19	25,406	+ 134,594	9.55		1.51
Seneca	6	180,000	300,000	480,000	22	49,137	+ 430,863	13.68		1.40
Steuben	7	210,000	350,000	560,000	73	102,046	+ 457,954	7.82		1.42
Sullivan	16	480,000	800,000	1,280,000	35	104,786	+ 1,175,214	24.34		1.99
Tioga	7	210,000	350,000	560,000	23	43,764	+ 516,236	12.03		.94
Tompkins	6	180,000	300,000	480,000	24	47,774	+ 432,226	9.44		.93
Ulster	20	600,000	1,000,000	1,600,000	43	157,543	+ 1,442,457	13.82		1.36
Warren	6	180,000	300,000	480,000	23	68,085	+ 411,915	14.91		2.11
Washington	5	150,000	250,000	400,000	41	56,252	+ 343,748	7.58		1.06
Wayne	9	270,000	450,000	720,000	37	93,648	+ 626,352	9.06		1.17
Westchester	136	4,080,000	6,800,000	10,880,000	56	812,719	+10,067,281	23.83		1.78
Wyoming	4	120,000	200,000	320,000	37	50,266	+ 269,734	8.49		1.33
Yates	4	120,000	200,000	320,000	20	23,331	+ 296,669	16.13		1.17
Sub Total	654	$19,620,000	$32,700,000	$52,470,000	2,135	$6,051,303	$+46,418,697	$10.08		$1.16
Nassau	216	6,480,000	10,800,000	17,280,000	88	194,113	+17,085,887	11.95		.13
Suffolk	76	2,280,000	3,800,000	6,080,000	45	419,494	+ 5,660,506	5.39		.37
Sub Total	292	8,760,000	14,600,000	23,360,000	133	613,607	+22,746,393	11.79		.30
TOTAL	946	28,380,000	47,300,000	75,830,000	2,268	6,664,910	+69,165,090	10.55		.92

[2] Based on Corrission recommendation that there should be 1 Justice for 2,000 cases, computed form 1973 actual caseload under Justice Court System.

B-5

Comparative Cost Analysis of the Recommendations of the Temporary Commission on the New York State Court System and the Present Justice Court System, "Mandated District Court Counties"

County	Proposed Number of Justices Based on 1973 Caseload[3]	Proposed Justices Salaries ($30,000 per Annum)	Proposed Support Staff Per Justice ($ Staff Members at $6,250 per Annum, or $50,000 Expenditures	Total Proposed Personal Services Expense	1973 Number of Town and Village Justices	1973 Town and Village Justice and Support Staff Expenditures	Comparison of Commission Recommendation with Expense of Current Justice System Increase (+) Decrease (-)	Comparison of Commission Recommendation with Expense of Current Justice System -per Capita Cost- Commission	Current System
Albany	15	$ 450,000	$ 750,000	$1,200,000	25	$139,230	$+1,060,770	$8.57	$ .99
Broome	19	570,000	950,000	1,520,000	38	145,822	+1,374,178	9.63	.92
Chautauqua	11	330,000	550,000	880,000	58	120,246	+ 759,754	9.70	1.32
Dutchess	16	480,000	800,000	1,280,000	48	175,310	+1,104,690	7.23	.99
Erie	48	1,440,000	2,400,000	3,840,000	63	586,609	+3,253,391	6.39	.97
Monroe	24	720,000	1,200,000	1,920,000	42	280,168	+1,639,832	4.60	.67
Nassau	216	6,480,000	10,800,000	17,280,000	88	194,113	+17,085,887	11.95	.13
Niagara	9	270,000	450,000	720,000	25	120,045	+ 599,955	6.11	1.35
Oneida	12	360,000	600,000	960,000	64	127,997	+ 832,003	7.31	.97
Onondaga	28	840,000	1,400,000	2,240,000	50	247,186	+1,992,814	8.12	.89
Orange	27	810,000	1,350,000	2,160,000	51	226,497	+1,933,503	13.17	1.38
Rensselaer	8	240,000	400,000	640,000	30	86,714	+ 553,286	8.05	1.09
Rockland	28	840,000	1,400,000	2,240,000	21	190,494	+2,049,506	9.74	.82
Schenectady	6	180,000	300,000	480,000	11	55,114	+ 424,886	5.77	.66
Suffolk	76	2,280,000	3,800,000	6,080,000	45	419,494	+5,660,506	5.39	.37
Westchester	136	4,080,000	6,800,000	10,880,000	56	812,719	+10,067,281	23.83	1.78
Sub Total	679	20,370,000	33,950,000	54,320,000	715	3,927,758	+50,392,242	7.56	.54

[3] Based on Commission recommendation that there should be 1 Justice for 2,000 cases, computed from 1973 actual caseload under Justice Court system.

CONTINUED

Comparative Cost Analysis of the Recommendations of the Temporary Commission on the New York State Court System and the Present Justice Court System, "Proposed Town Justice Court Counties"

County	Proposed Number of Justices Based on 1973 Caseload[4]	Total Proposed Personal Services Expense[5]	1973 Number of Town and Village Justices	1973 Town and Village Justice and Support Staff Expenditures	Comparison of Commission Recommendation with Expense of Current Justice System Increase (+) Decrease (-)	Comparison of Commission Recommendation with Expense of Current Justice System -per Capita Cost- Commission	Current System
Allegany	28	$45,152	67	$ 58,481	$-13,329	$ .97	$1.25
Cattaraugus	31	67,591	71	77,991	-10,400	1.23	1.42
Cayuga	23	57,812	54	64,008	- 6,196	1.34	1.49
Chemung	11	58,963	27	71,403	-12,440	.95	1.15
Chenango	22	36,973	50	43,314	- 6,341	.98	1.15
Clinton	16	53,119	35	56,218	- 3,099	.97	1.03
Columbia	18	73,471	38	76,221	- 2,750	1.72	1.79
Cortland	15	30,404	33	33,614	- 3,210	1.15	1.27
Delaware	19	48,921	41	96,280	- 7,359	1.09	1.25
Essex	18	97,589	37	100,064	- 2,475	2.81	2.88
Franklin	19	60,412	41	78,949	-18,537	1.37	1.79
Fulton	10	28,209	22	29,709	- 1,500	1.23	1.29
Genesee	[redacted]	67,091	30	72,906	- 5,815	1.62	1.76
Greene	14	47,775	32	57,606	- 9,831	1.44	1.73
Hamilton	9	27,420	19	28,320	- 900	5.81	6.00
Herkimer	18	56,222	43	70,221	-13,999	.93	1.17
Jefferson	22	74,855	56	87,127	-12,272	1.29	1.50
Lewis	17	26,089	40	31,274	- 5,185	1.10	1.32
Livingston	17	58,022	41	76,922	-18,900	1.07	1.42
Madison	15	54,119	39	65,736	-11,617	1.05	1.28
Montgomery	10	33,604	20	33,604	0	1.10	1.10
Ontario	16	67,259	36	70,330	- 3,071	1.30	1.36
Orleans	10	32,614	22	47,212	-14,598	.87	1.26
Oswego	22	73,837	45	76,343	- 2,506	1.11	1.15
Otsego	24	48,749	52	51,888	- 3,139	1.21	1.29
Putnam	6	114,436	15	119,171	- 4,735	2.54	2.10
St. Lawrence	32	118,549	72	144,513	-25,964	1.21	1.48
Saratoga	19	92,300	42	101,090	- 8,700	.95	1.04
Schoharie	16	29,249	36	34,599	- 5,350	1.18	1.39
Schuyler	8	20,495	19	25,406	- 4,911	1.22	1.51

CONTINUED

Comparative Cost Analysis of the Recommendations of the Temporary Commission on the New York State Court System and the Present Justice Court System, "Proposed Town Justice Court Counties"

Seneca	10	$ 33,468	22	$ 49,137	$-15,669	$ .95	$1.40
Steuben	32	80,806	73	102,046	-15,240	1.21	1.42
Sullivan	15	88,353	35	104,786	-16,433	1.68	1.99
Tioga	9	31,370	23	43,704	-12,394	.67	.94
Tompkins	10	38,869	24	47,774	- 8,905	.76	.93
Ulster	20	148,516	43	157,543	- 9,027	1.28	1.36
Warren	11	62,772	23	68,085	- 5,313	1.95	2.11
Washington	17	38,889	41	56,252	-17,363	.73	1.06
Wayne	15	92,094	37	93,648	- 1,554	1.15	1.17
Wyoming	16	38,672	37	50,266	-11,594	1.02	1.33
Yates	9	19,300	20	23,331	- 4,031	.97	1.17
Sub Total	682	$2,554,200	1,553	$2,737,152	$-182,952	$2.03	$1.90
TOTAL	1,351	$59,874,200	2,268	$6,664,910	$+50,209,290	$6.98	$ .92

4. Based on Commission recommendation that each Town elect 1 Justice, rather than the 2 currently authorized; that the Village Justice Courts be discontinued; and, the number of Town Justices serving during the 1973 calendar year.

5. Based on Commission recommendation that judicial costs remain at the discretion of the Towns; that each Town would, to compensate the Town Justices for the assumption of approximate 473,408 cases handled by the Village Courts in addition to the approximate 831,606 handled by them for the 1973 calendar year, provide each Town Justice (1) with a clerk at one-half of the salary paid, the discontinued Town Justice post and (2) increase the single Justice's salary by the other half of the salary formerly paid, in recognition of increased workload; that Villages would not compensate Towns for cases arising in villages.

B-8

Number of Lawyer and Nonlawyer Town and Village Justices in New York State During the Calendar Year 1974, By County [6]

County	Number of Town Lawyer Justices	Number of Town Nonlawyer Justices	Number of Village Lawyer Justices	Number of Village Nonlawyer Justices
Albany	5	16	2	4
Allegany	1	55	1	15
Broome	3	29	4	6
Cattaraugus	2	60	1	13
Cayuga	0	46	0	10
Chautauqua	5	49	1	7
Chemung	5	17	3	4
Chenango	2	41	1	8
Clinton	0	31	0	5
Columbia	1	34	0	4
Cortland	0	30	0	5
Delaware	3	34	2	6
Dutchess	10	30	4	8
Erie	22	28	16	8
Essex	1	35	0	1
Franklin	0	37	0	7
Fulton	0	20	0	3
Genesee	0	26	0	4
Greene	0	27	0	6
Hamilton	0	18	0	2
Herkimer	0	36	2	8
Jefferson	0	44	1	13
Lewis	0	34	0	10
Livingston	1	33	1	9
Madison	3	27	2	10
Monroe	12	27	5	1
Montgomery	0	20	0	0
Niagara	0	24	0	1
Oneida	1	52	4	14
Onondaga	12	27	5	8
Ontario	0	32	0	3

B-9

Number of Lawyer and Nonlawyer Town and Village Justices in New York State During the Calendar Year 1974, By County

Orange	10	30	6	11
Orleans	0	20	2	2
Oswego	0	43	0	1
Otsego	1	47	0	5
Putnam	7	5	1	3
Rensselaer	4	22	1	5
Rockland	8	1	15	2
St. Lawrence	5	39	6	2
Saratoga	4	37	2	4
Schenectady	2	8	1	1
Schoharie	0	31	0	5
Schuyler	0	16	0	4
Seneca	1	18	2	3
Steuben	1	62	2	15
Sullivan	4	26	2	7
Tioga	0	18	1	5
Tompkins	0	19	1	5
Ulster	4	36	1	4
Warren	3	19	0	1
Washington	0	34	1	10
Wayne	4	26	4	8
Westchester	34	2	33	1
Wyoming	1	31	1	8
Yates	0	18	0	5
Sub Total	179	1,647	134	320
Nassau	0	0	85	3
Suffolk	2	10	30	3
Sub Total	2	10	115	6
Total	181	1,657	249	326

[6] Attorney Town and Village Justices in New York State as of 10/26/74 and Town and Village Justices in New York State as of 10/24/74 computer printout, New York State Office of Court Administration, New York, New York. These printouts contain some duplicate references to lawyer justices which were not removed prior to the compilation of this table.

APPENDIX

APPENDIX C

Survey of States Employing Nonlawyer Justices — Training Programs

States With Mandatory Training Programs

Delaware
Florida
Idaho
Iowa
Mississippi
Montana
New Mexico
New York
North Carolina
North Dakota[1]
Pennsylvania
Texas
Utah
Washington
West Virginia[2]
Wyoming

States With Voluntary Training Programs

Alaska
Georgia[3]
Kansas
Louisiana
Missouri
Nevada
New Hampshire
Oregon
South Carolina
Tennessee[4]
Vermont
Wisconsin[5]

States With No Training Programs

Arizona
Arkansas
Kentucky

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[1]One-half to two-thirds of communities in state have fewer than 100 people and no attorneys.

[2]Effective January 1, 1976.

[3]New course in planning stage; many districts without attorneys.

[4]A number of counties without lawyers.

[5]No power to incarcerate; fines only.

Nonlawyer Training Program Survey

Alaska

Source: Juneau District Court Judge William and Juneau Magistrate Richard Siangco

Magistrates courts conduct preliminary hearings and have jurisdiction over misdemeanors and traffic violations. Nonlawyer magistrates are not required by law to receive training, but the Alaska Supreme Court and Alaska Courts Administrator supervise a comprehensive training program. Incoming nonlawyer judges take a two week seminar at the National College of Judicature at Boulder, Colorado. Various seminars and two judicial conferences are also given throughout the year. Every three years the magistrates must attend another four week session, in addition to the seminars given each year. Magistrates are under the direct supervision of district court lawyer judges. In many local jurisdictions there are no attorneys.

Arizona

Source: Mike Sophy, Special Assistant Attorney General, Phoenix

Justices of the peace preside over preliminary hearings, misdemeanors and traffic infractions. Arizona is one of only three states which do not require their nonlawyer judges to be trained. There apparently exists a strong attitude in the state legislature that laymen make good justices of the peace. However, there is an annual series of seminars given at the major colleges and universities throughout the state which many of the state's 51 nonlawyer judges attend.

Nonlawyer Training Program Survey

Arkansas

Source: C. R. Huie, State Court Administrator, Littlerock

Arkansas is also one of the three states requiring no training for their nonlawyer judges. In Arkansas, however, nonlawyers preside only as justices of the peace (20 judges) and, in smaller communities, city court judges (83 judges). These courts have jurisdiction over preliminary hearings, misdemeanors and traffic infractions. However, the state's municipal courts have countywide jurisdiction and hear 90% of the preliminary hearings, misdemeanors and traffic cases. All municipal court judges are lawyers. In many sparsely populated communities with nonlawyer judges there are few, if any, lawyers.

Delaware

Source: Ms. Sharon Cooper, Secretary to James Horgan, Deputy Administrator to the Chief Justice, Wilmington

Only justices of the peace may be nonlawyers. They are appointed by the governor with the approval of the state senate. Applicants are screened and tested. New judges are given an intensive two-week training program. They receive a weekly newsletter explaining new laws and decisions. Further, they must attend one seminar each month. Of 51 justices of the peace, 50 are nonlawyers, and they have jurisdiction over matters which potentially involve incarceration.

Florida

Source: Frank Habershaw, Deputy State Court Administrator, Tallahassee

Nonlawyers may preside as county judges only in counties having a population of less than forty thousand (27 counties).

Their jurisdiction includes the power to incarcerate. Although not required by law, a nonlawyer judge training program is administered by the Chief Justice of the Florida Supreme Court. Nonlawyer judges must spend four weeks in each of three successive summers at the University of Florida taking daily classes from 8:00 a.m. to 5:00 p.m. During the remainder of the year, the nonlawyer judges must spend four days per month in classes at the university.

Georgia

Source: Christopher Perrin, Office of Court Administration, Atlanta

Judges in probate courts, mayor and city courts, and justices of the peace need not be lawyers. They have varying jurisdiction, but each has the power to incarcerate. It is estimated that 80% of the 159 probate court judges, 95% of the more than 1,000 justices of the peace, and many of the mayor and city court judges are nonlawyers. The Office of Court Administration is relatively new and the Georgia court system is in the process of being centralized. Although there is no training program required by law, the probate court judges have an annual three-day seminar attended by most probate judges. The judges of the peace sponsor local seminars. There is apparently no present training program for the mayor and city court judges. However, the Office of Court Administration is implementing a new training program for all incoming judges. In many jurisdictions there are no attorneys available for these judgeships, particularly the justice of the peace courts.

Idaho

Source: Richard Hammond, Office of Court Administration, Boise

In Idaho, nonlawyer magistrates may hear only offenses (including traffic) which involve potential incarceration of six months or less. Only attorney magistrates or district court judges may hear misdemeanor cases involving potential sentences of greater than six months. After appointment by the Magistrates Commission, all magistrates must attend the basic two-week training program at the National College of State Judiciary in Reno, Nevada. Most of the nonlawyer judges then voluntarily attend an annual four-week course during the summer. Twenty-five of the seventy magistrates are nonlawyers and most of the lawyer magistrates have predominantly civil practice backgrounds.

Indiana

Source: Stephen Daniels, Executive Secretary of the Judicial Study Commission, Indianapolis

In *In re Judicial Interpretation of 1975 Senate Enrolled Act No. 441*, Ind. , N.E. 2d (August 1, 1975), the Indiana Supreme Court held that nonlawyer judges may not preside over criminal cases. Prior to that advisory opinion in which the Court examined recent legislation revamping the Indiana court system, except for a test given to all incoming judges there was no training for Indiana's nonlawyer judges. In any event, nonlawyer judges consisted solely of justices of the peace who did not possess the power to incarcerate. Under the new legislation, effective January 1, 1976, county courts will hear all petty criminal offenses and justices of the peace will only preside over civil matters.

Nonlawyer Training Program Survey

Iowa

Source: Jerry Beatty, Office of Court Administration, Des Moines

Nonlawyer district court judges may hear traffic cases and nonindictable misdemeanors. They are statutorily required to attend an annual three-day training course. A fall program dealing with traffic court violations is also offered and attended by a large majority of the nonlawyer judges.

Kansas

Source: James L. James, Judicial Administrator for the Courts of Kansas, Topeka

Probate, juvenile, magistrate, and municipal court judges need not be lawyers. They hear traffic and ordinance violations and may incarcerate. Although it is not mandatory, the state's annual two and three-day conferences are regularly attended by 100% of the nonlawyer judges.

Louisiana

Source: J. J. McKenzie, Assistant Attorney General, Baton Rouge

The attorney general's office presents a voluntary and highly effective annual three-day training course for all nonlawyer judges. The nonlawyer judges preside in justice of the peace courts and have the power to incarcerate.

Nonlawyer Training Program Survey

Mississippi

Source: Benjamin H. Walley, Assistant Attorney General, Jackson

A statutorily mandated training course is given every year for the state's nonlawyer judges. The nonlawyer judges are justices of the peace with the power to incarcerate. They must attend the annual three-day training course.

Missouri

Source: Kenneth Dean, Office of Court Administration, Jefferson City

Missouri's nonlawyer judges, who are municipal court judges, may hear only ordinance violations, but have the power to incarcerate. They must attend five one-day training sessions every other year. The program is generally considered very effective.

Montana

Source: Thomas Honzel, Training Coordinator for Montana County Attorneys Association, Helena

A statutorily required week-long training program is given to all of Montana's justices of the peace and municipal court judges. Those courts have jurisdiction over misdemeanors and traffic violations and may incarcerate upon conviction. In addition to the madatory training course, nonlawyer judges voluntarily attend two week-long courses conducted by the Law Enforcement Academy.

Nevada

Source: James Hancok, Library Assistant, North College of State Judiciary, Reno

Justices of the peace are Nevada's only nonlawyer judges and they voluntarily attend two weeks of seminars and conferences every year at the National Training Center for Justices in Reno. These justices have the power to incarcerate.

New Hampshire

Source: George Pappagianis, Supreme Court Clerk, Concord

Probate, municipal and district courts in New Hampshire have the power to incarcerate. Many of these judges are nonlawyers who voluntarily attend periodic conferences and seminars held at the University of New Hampshire.

New Mexico

Source: Larry D. Coughenour, Director of Administrative Office of the Courts, Santa Fe

In addition to a mandatory annual training program, probate, magistrate and municipal court judges also attend conferences and seminars given by the American Academy and the National Training Center for Justices in Reno, Nevada. Probate and magistrate courts have jurisdiction over criminal matters and municipal courts (towns, cities and villages) have jurisdiction over traffic violations.

North Carolina

Source: Dallas Cameron, Training Director, Raleigh

District court judges need not be lawyers. Those courts have criminal jurisdiction and have the power to incarcerate.

Nonlawyer district court judges must, as of September 1, 1975, receive a minimum of forty hours of training and may also be required by the senior resident superior court judge to receive an on-the-job training session of up to three months.

North Dakota

Source: Theodore Gladden, Assistant State Court Administrator, Bismarck

Effective July 1, 1975, a statutorily required training program is administered to all nonlawyer municipal court judges who have authority to incarcerate. Three-day seminars are supplemented by an out-of-state program coordinated with the National College of the State Judiciary in Reno, Nevada. Of the 210 municipal judges, 193 are nonlawyers. In one-half to two-thirds of the municipalities in North Dakota, there reside fewer than 100 people and usually no lawyers.

Oregon

Source: Thomas H. Denney, Assistant Attorney General, Salem

Justices of the peace, who possess the power to incarcerate, need not be lawyers. A non-mandatory training program is made available which includes both in and out-of-state seminars.

Pennsylvania

Source: Jonathan Vipand, Counsel to Court Administrator, Philadelphia

State law requires nonlawyer justices of the peace to take a two-week training course at a state college. Virtually all jurisdictions of the justice of the peace courts in Pennsylvania have nonlawyer judges. In addition to the mandatory training

program, the Pennsylvania Supreme Court, pursuant to its supervisory powers, requires attendance of all nonlawyer justices at seminars given throughout the year. These seminars cover a wide range of criminal law matters and last three to five days.

South Carolina

Source: William A. Dallis, Director of Court Administrative Office, Columbia

Magistrate or municipal court judges need not be lawyers. Several voluntary training sessions two to three days in length are held each year throughout the state. In criminal cases the nonlawyer judges may hear only petty misdemeanors involving a maximum 30-day jail term, or lesser infractions.

Tennessee

Source: Rob Littleton, Assistant Attorney General, Nashville

General sessions courts conduct preliminary hearings and try misdemeanor and lesser criminal charges, and the judges of those courts (formerly justice of the peace courts) need not be lawyers. Probate and juvenile court judges need not be lawyers. Although state law does not require a training program, these nonlawyer judges attend an annual week-long seminar. In many counties in Tennessee, there are no lawyers and these judges must of necessity be nonlawyers.

Texas

Source: Maurice Pitkin, Executive Director, Judicial Qualifications Commission of Texas, Austin

Texas' 900 justices of the peace, need not be lawyers and they handle misdemeanor and lesser criminal offenses. Some county

judges are also nonlawyers. State law requires a continuous training program for these nonlawyer judges, which includes lectures, mock courts and workshops dealing with all phases of their work.

Utah

Source: Earl F. Dorius, Assistant Attorney General, Salt Lake City

Utah's justices of the peace, who have criminal jurisdiction, are required to attend two conferences each year which include workshops, lectures, course materials, and sanctions for nonattendance. Further, more frequent regional workshops are held to update the content of the regular conferences.

Vermont

Source: Lawrence J. Turgeon, Court Administrator, Montpelier

Only probate judges in Vermont may be nonlawyers and they have no criminal jurisdiction. Nonetheless, they are given frequent out-of-state seminars at institutions like the American Academy.

Washington

Source: Constance Bowers, Education and Information Specialist, Office of Administrator for the Courts, Olympia

Justice of the peace courts and municipal courts have jurisdiction over criminal matters. Judges of those courts need not be lawyers. However, the Washington State Criminal Justice Training Commission requires all nonlawyer judges to attend a five-day training program.

Nonlawyer Training Program Survey

West Virginia

Source: Forest J. Bowman, Administrative Director of the Supreme Court of Appeals, Charleston

Justices of the peace and judges of the magistrates courts have the power to incarcerate. A recent amendment to West Virginia law requires a comprehensive training program to be implemented for all nonlawyer judges by January 1, 1976.

Wisconsin

Source: Charles Wheeler, Assistant Director of Education, Judicial Education Center, Madison

Municipal court judges need not be lawyers. Those courts may incarcerate criminal defendants only for failure to pay a fine. Two-thirds of the approximately 225 municipal court judges are nonlawyers. A voluntary training program has been initiated by the education department and, while being expanded, now includes two annual conferences and course materials.

Wyoming

Source: Hon. J. Reuel Armstrong, Court Coordinator, Cheyenne

Justices of the peace preside over criminal matters with a maximum of three months of incarceration. Sixteen of the state's 39 justices of the peace are nonlawyers. Although justices of the peace must be lawyers, if none are available to serve, the county commissioner appoints a nonlawyer. Municipal courts have jurisdiction over ordinance violations and may incarcerate for a maximum of three months. Thirty-nine of the state's 59 municipal court judges are nonlawyers. Municipal court judges are appointed and must be lawyers. However, nonlawyers are appointed when lawyers, for various reasons, are unavailable. These judges must attend five-day training programs every six months.

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In the Supreme Court of the United States

October Term, 1975

No. 74-1409

LONNIE NORTH

Appellant,

vs.

C. B. RUSSELL AND NATHANIEL "TRAP" HELTON, JAILER OF HARLAN COUNTY

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

Brief of The Salt Lake Legal Defenders Association As Amicus Curiae

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In the Supreme Court of the United States

October Term, 1975

No. 74-1409

LONNIE NORTH

Appellant,

vs.

C. B. RUSSELL AND NATHANIEL "TRAP" HELTON, JAILER OF HARLAN COUNTY

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

BRIEF OF THE SALT LAKE LEGAL DEFENDER ASSOCIATION AS AMICUS CURIAE

BASIS FOR FILING AND STATE OF THE INTEREST OF AMICUS CURIAE

The Salt Lake Legal Defender Association has requested and received consent to the filing of this Brief Amicus Curiae from both counsel for Appellant North and the Attorney General of the Commonwealth

of Kentucky who represents the Appellees. Filing of this Brief is thus premised on the consent of all the parties pursuant to Rule 42(2) of this Court. The original written consents of the parties have been filed with the Clerk of this Court.

The Salt Lake Legal Defender Association is a non-profit organization which through contractual agreement with the County of Salt Lake, State of Utah has the responsibility for providing criminal defense services to the indigent criminally accused in Salt Lake County. This responsibility requires the Salt Lake Legal Defender Association to represent individuals before non-lawyer Justices of the Peace in Salt Lake County. Furthermore, the Salt Lake Legal Defender Association, through counsel, has recently challenged the constitutionality of the use of non-lawyer justices of the Peace in Salt Lake County in the case of *Shelmidine and Reeves v. Jones et. al.* (Third District Court No. 224948). In that case the Court for the Third Judicial District in and for Salt Lake County ruled that the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States bar the imposition of any jail sentence by a non-lawyer or lay justice of the peace. This case is now on appeal to the Supreme Court of the State of Utah.

Amicus Salt Lake Legal Defender Association submits that the resolution of the instant case, *North v. Russell*, will ultimately resolve the issues extant in *Shelmidine and Reeves vs. Jones et. al.* as well as having great effect on the justice of the peace system in

Salt Lake County and therefore on the jurisdiction of the *Amicus Salt Legal Defenders Association* in those tribunals. Therefore *Amicus Salt Lake Legal Defender Association* respectfully requests consideration of this Brief in support of the Appellant North in the instant case.

SUMMARY OF ARGUMENT

Point I

Elemental concepts of Due Process of Law as embodied in the Fifth and Fourteenth Amendments to the Constitution of the United States demand at this point in time that a criminally accused faced with any change which may result in imprisonment have his case tried before a lawyer judge. Such an argument for a legally competent tribunal is not new but finds its foundation in the theoretical basis of Magna Carta as well as evolving concepts of ordered liberty in Twentieth Century America. The recent judicial as well as legislative trend in the State Courts and Legislatures of this country is to severely limit the jurisdiction of non-lawyer judges who heretofore have presided over the trial of various criminal offenses for which they lack adequate training, knowledge and legal expertise. This trend clearly indicates that the unproven assertions that the system of justice in many states such as Utah and Kentucky with large rural areas will not survive if law trained judges are mandated, is simply unfounded. Furthermore, your amicus does not argue for the death knell of the lay justice system, but merely that it be

brought within the reality of this Courts recent decisions on the right to counsel in criminal cases.

Due process in the system of American Criminal Justice is demanded in the first instance and hence the fact that an individual may ultimately have his case resolved by a competent tribunal is of little comfort to the individual who must wait in jail while his trial de novo appeal is prepared. Such de novo review besides being of little comfort is of equally little constitutional significance since valuable rights may be lost by the use of "convenient" lay judges. Notably to be lost in such a scheme is the accused's right to a speedy trial in the first instance before a competent judge.

II

The use of non-lawyer judges in the inferior courts of this country besides being an out moded vestige of an earlier era in this country's development, also has the effect of nullifying other rights long since accorded the criminally accused in the United States. The use of non-lawyer judges in criminal cases where a jail sentence may result presents a clear nullification of an accused's right to counsel guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States. Such a situation presents the spector of a constitutionally mandated legal advisor to the criminally accused whose role becomes constitutionally meaningless since his legal arguments are rendered useless falling as they do on the deat ear's of a judge who

has neither the legal expertise or training to comprehend what counsel is talking about. Nowhere is such an absurd situation more manifest then in the type of charge which the Appellant North must defend. Although a misdemeanor, driving while intoxicated presents complex issues on the admissibility of evidence, and oft times involves complex constitutional questions as well as evidentiary issues of varying complexity. To rule that a non-lawyer judge's unguided rulings on such questions comports with the constitutional requirement of counsel by the side of the accused to aid the accused in raising such issues or to defend against the presentment of such issues, is tantamount to making counsel's assistance meaningless. Clearly that should not be the effect of this Court's decisions mandating the assistance of counsel in criminal cases where a jail sentence may be the ultimate result.

POINT I

DUE PROCESS OF LAW REQUIRES THAT A JUDGE IN A CRIMINAL CASE IN WHICH A JAIL SENTENCE MAY BE IMPOSED BE TRAINED IN THE LAW.

When, in 1215 at Runnymede, King John was compelled by his barons to sign the Magna Carta, he swore to two propositions relevant to this case:

> No free man shall be taken, imprisoned, disseised, . . . or in any way destroyed, nor will we proceed against or prosecute him, except by the

> lawful judgment of his peers and by the law of the land. Chapter 39
>
> We will appoint as justiciaries, constables, sheriffs or bailiffs only such men as know the law of the land and will keep it well. Chapter 45[1]

Your amicus submits this brief to urge that, in 1975, Constitutional guarantees of due process derived in part from Magna Carta include the right to be tried by a judge trained in the law, and capable as today only a law trained person can be, of knowing the law, and applying it competently.

This Court has held that all defendants are entitled to a fair trial, *Adamson v. California*, 332 U.S. 46, reh. den. 332 U.S. 784 (1947); *Tumey v. Ohio*, 273 U.S. 510 (1927). While the Fourteenth Amendment is not a guarantee that a trial shall be devoid of error, if the error is gross and obvious, coming close to the boundary of arbitrary action, there is a violation of due process, *Roberts v. New York City*, 295 U.S. 264 (1934). Due process requires that the varied criminal procedure in the several states be subject to the overriding requirement of fundamental fairness implicit in the concept of ordered liberty. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

No matter how well-meaning a lay judge may be, there are compelling reasons why such an untrained

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[1] A. E. Dick Howard, Magna Carta. Text and Commentary 43, 45 (1964).

judge should not be permitted to perform judicial functions in proceedings which affect the liberty of a criminally accused.

The Supreme Court of California has recently held, in the case of *Gordon v. Justice Court*, 115 Cal. Rptr. 632, 12 Cal. 3d 323, 525 P. 2d 72 (1974), cert. den. 43 L.Ed. 2d 415 (Feb. 18, 1975) that the use of non-lawyer judges in criminal cases where a jail sentence may result is a patent denial of due process of law.

The court held:

> . . . we conclude that, under today's advanced standards, due process demands that henceforth a defendant charged with an offense carrying a possible jail sentence must be provided with an attorney judge to preside over the proceedings, unless he elects to waive such right. (525 P. 2d at 79)

Gordon and Arguijo, the defendants in that case, were brought before different non-attorney justice court judges to stand trial for misdemeanors, punishable with a possible jail sentence. Gordon was charged with disturbing the peace and failure to disperse and Arguijo with driving under the influence of alcohol. The California Supreme Court, in bank, unanimously held that due to the lack of legal training "a reasonable likelihood exists that a non-attorney judge will be unable to afford a defendant a fair trial." (525 P. 2d at 79).

Justices of the Peace in Utah have criminal jurisdiction which is similar to the jurisdiction of the inferior courts in Kentucky. The justices in Utah preside over

cases involving several specified misdemeanors and all misdemeanors punishable by up to a Three Hundred Dollar ($300.00) fine or six (6) months in prison or both, Section 78-5-4 *Utah Code Annotated* (1953). The jurisdiction of the California justice courts, struck down in *Gordon*, was quite similar (See 525 P. 2d at 74). At the outset of that case the California Court stated that no distinction of constitutional dimension could be made solely on the basis that the justice court's deal exclusively with misdemeanor cases. In this regard it was noted that the constitutional and legal issues involved in a misdemeanor case:

> . . . may be as complex as those involved in a trial of a more serious offense. (See *Argersinger v. Hamlin*, 407 U.S. 25, 33, 92 S. Ct. 2006, 32 L. Ed. 2d 530). There is little guarantee that the background of a non-attorney judge will have prepared him to recognize these issues and resolve them according to established legal principles. (525 P. 2d at 76).

While noting the breadth of the recent development of constitutionally mandated criminal procedure, the court further opined that such functions as charging the jury, taking guilty pleas, making difficult sentencing decisions, and ruling on difficult constitutional and evidentiary issues demand highly developed legal skill and training and can not be performed by one not trained in the law (525 P. 2d at 72). Interestingly the court noted that ruling on the complex evidentiary issues surrounding the administering of various blood alcohol tests in driving under the influence cases is one instance where the non-attorney judge is not going to

be able to perform satisfactorily. The Appellant in the instant case, and the Plaintiff's in *Shelmidine and Reeves v. Jones et al*, all charged with driving under the influence, thus face the same quandry as that which the California Court found so telling in making their decision.

The California Court found support for its landmark ruling in the dynamic quality of the concept of Due Process of Law. Quoting at length from Mr. Justice Frankfurter's opinion in *Wolf v. Colorado*, 338 U.S. 25, 27 (1949) Justice Burke speaking for the unanimous court stated:

> Whatever the justification for permitting laymen to preside over criminal trials in the 1800's, it is well recognized that even long-standing practices must meet the advancing standards of due process. (525 P. 2d at 75).

The court then noted that this Court's landmark right to counsel decisions of *Gideon v. Wainwright*, 372 U.S. 335, (1963) and *Argersinger v. Hamlin*, 407 U.S. 25, (1972), recognized that the complexities involved in defending oneself in a criminal trial are beyond the capabilities of the average layman untrained in the law, regardless of the severity of the penalty. Taking the next step the California court said:

> . . . it logically follows that the failure to provide a judge qualified to comprehend and utilize counsel's legal arguments likewise must be considered a denial of due process. (525 P.2d at 78).

Thus, the decision by the California Supreme Court sets forth a definitive ruling that the due process of law embodied in the Fourteenth Amendment to the United States Constitution finds the use of non-lawyer judges in criminal trials where jail-time may result, constitutionally impermissible. Those few other cases which have dealt with this specific issue are not so definitive and are readily distinguishable, as was noted by the California Court. (525 P. 2d at 78).

Three of these cases, *City of Decatur v. Kushner*, 43 Ill. 2d 334, 253 N.E. 2d 425 (1969); and *Crouch v. Justice Court*, 7 Ariz. App. 460, 440 P. 2d 1000 (1969) and *Melkean v. Avent*, 300 F. Supp 516 (D.C.N.D. Miss. 1969) are pre-*Argersinger v. Hamlin* decisions. The precedential value of these cases is therefore of limited validity considering the California Court's justified reliance on the *Argersinger* rationale for its decision. Furthermore, in none of these cases was the issue in the instant case really thoroughly discussed. In *City of Decatur v. Kushner* the issue seems to have been raised by counsel as an afterthought and for the first time on appeal. The Supreme Court of Illinois casually dismissed the constitutional issue with citations only to Am. Jr., C.J.S., and state statutory and constitutional provisions.

In *Crouch v. Justice Court*, the intermediate appellate court in Arizona dealt solely with the issue of whether allowing a Justice of the Peace to instruct the jury as to the law in a criminal misdemeanor case was a

denial of due process. The court in *Crouch* similarly did not reach the precise issue at the bar today.

Melkean v. Avent, 300 F. Supp. 516 (D.C.N.D. Miss. 1969) is even less in point. This pre-*Argersinger* decision embodied an action in Federal Court to have the entire Mississippi Justice of the Peace Court System declared unconstitutional. Importantly, however, the action in the Justice Court upon which the plaintiff asked for injunctive relief in Federal Court was a civil suit sounding in *contract*, and not a criminal action. The issue as to whether a non-lawyer judge may constitutionally preside over a criminal trial where a jail sentence may result was not even discussed peripherally.

The only real authority which may be found in opposition to the California Court's decision in *Gordon* is the series of decisions from the Kentucky Court of Appeals one of which is the instant case involving the Appellant North. *Ditty v. Hampton*, Ky., 490 S.W. 2d 772 (1972) app. dism. 414 U.S. 885 (1973); and *North v. Russell*, Ky., 516 S.W. 2d 103 (1974) vac. and rem. 95 S. Ct. 673 (1974). *Ditty v. Hampton*, is the bench mark in Kentucky and the Court, therein ruled, post-*Argersinger*, that due process does not require that the court in a criminal case be presided over by a lawyer judge. The conclusion of that court is best indicated by the following statement:

> . . . we think it is clear, accepting due process as a living principle, that advancing standards or changing conditions *have not yet* made the lawyer judge a condition of fundamental fairness. (490 S.W. 2d at 772). (Emphasis Supplied)

The California Court, specifically citing ***Ditty v. Hampton***, unequivocably disagreed:

> The people point out that the courts of several states have concluded that the use of non-attorney judges is consistant with the demands of due process . . . [citing ***Ditty v. Hampton***, supra, ***Crouch v. Justice of the Peace Court*** supra; and ***City of Decatur v. Kushner***, supra] . . . yet, none of these cases convincingly resolved the inherent inconsistancy in guaranteeing a defendant an attorney to represent him without providing for an attorney judge to preside at the proceedings. As we have seen a defendant's right to a fair trial may be substantially abridged by the use of a non-attorney judge. (***Gordon v. Justice Court***, supra, 525 U. 2d at 78).[2]

Recently the District Court of the Third Judicial District in and for Salt Lake County, State of Utah, has followed the rationale of the California Court in *Gordon* in ruling on the constitutionality of Utah's Justice of the Peace System. In that case, ***Shelmidine and Reeves v. Jones et al***, which is presently on appeal to the Supreme Court of Utah, the District Court held:

> . . . that the practice under Utah law which allows non-lawyer or lay justices of the peace to impose a jail sentence or imprisonment constitutes a denial of a criminal defendant's right to a fair trial in violation of the mandate of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. To the extent

[2] And, it might be noted parenthetically that the circuit court judge in Kentucky in **Ditty v. Hampton** found the use of non-attorney police court judges in criminal cases a denial of both due process and equal protection.

> that Section 78-5-4, Utah Code Annotated, authorizes lay justices of the peace to impose imprisonment, it, too, is violative of the guarantees under the Federal Constitution of Due Process, of the right to fair trial and of the right to counsel, and is void. (Memorandum Decision at 6 of Judge Stewart M. Hanson, Jr.)

Your Amicus submits, that the California Court in *Gordon*, and Judge Hanson's opinion in ***Shelmidine and Reeves*** states the better reasoned rule and that Due Process of Law requires an attorney judge to preside over any criminal case where a jail sentence may be the result of a conviction.

The legislative trend in the United States also supports this point. An increasing number of jurisdictions are abandoning lay judge systems. At the present time, the laws of 15 jurisdictions exclude lay judges from hearing cases in which the defendant is charged with a crime punishable by imprisonment: Connecticut, the District of Columbia, Georgia, Illinois, Louisiana, Maine, Michigan, Missouri, New Jersey, Oklahoma, Rhode Island, Tennessee, Texas, Vermont and Wyoming. Of these 15 jurisdictions, moreover, 11 have also precluded lay judges from presiding over preliminary hearings and issuing search and arrest warrants. These facts indicate a significant trend toward the abolition of lay judge jurisdiction over criminal matters in the various states.

A model for the states was provided by the Federal Magistrates Act, 82 Stat. 1107, 28 U.S.C. Section 631 (1)(b)(1) (1968). That Act replaced Title 28, Chap-

ter 43 of the United States Code which had provided for United States Commissioners who were not required to have legal training. The new law requires all full-time federal magistrates to be members of the bar. The rights of defendants in state and local courts are just as precious as those of federal defendants. Moreover, it was the consensus of the 1971 National Conference on the Judiciary that, "judges should be full-time officials, professionally trained in the law and aware of its traditional values." (Consensus Statement of the National Conference on the Judiciary", 55 J. Amer. Jud. Soc. 29, at 30 (1971).

The most recent legislative limitation on the use of non-lawyer judges is found in the recent revision of the statute found constitutionally wanting by Judge Hanson in *Shelmidine and Revves v. Jones et al.* In response to the Utah District Court's decision in that case a Special Session of the Utah legislature recently passed legislation which gives a defendant in a criminal case the right to be tried and sentenced by a judge who is a member of the Utah State Bar Association. This statute, which takes effect on September 2, 1975, clearly shows that the often alleged problems of travel, transportation, and lack of an adequate number of lawyers can be overcome, while providing lawyer judges for all criminally accused. It is often argued that in states such as Utah and Kentucky where there are few lawyers in

many of the rural counties and long distances to travel to the various county seats where the Courts of General Jurisdiction sit, that requiring law trained judges for the criminally accused in all misdemeanor cases becomes an impossible task. House Bill No. 1 which amends Section 78-5-4, Utah Code Annotated (1953) shows however that such arguments have little substance. This legislation provides that District Court Judges, who must be lawyers in Utah, may hear the cases as Justices of the Peace Pro Tempore or appoint a member of the Utah Bar to sit as a Justice of the Peace Pro Tempore in order to accord the criminally accused his right to a competent tribunal. This simple solution to the problem in Utah overcomes those commonly voiced objections and the alleged problems in mandating lawyer judges in our inferior courts. This simple but effective response by the Utah Legislature gives effect to the wisdom inherent in Judge Hanson's statement that:

> Modern transportation and communication have considerably alleviated much of the problem earlier encountered in effectuating a viable means of administering effective and speedy justice on the misdemeanor level. (Memorandum Decision at 3)

And this is true even though, as Judge Hanson noted, of the 29 Counties in Utah there are still eight counties with two or less resident attorneys and five counties with no resident attorney.

A

THE DENIAL OF DUE PROCESS BY REQUIRING TRIAL BEFORE A JUDGE WITHOUT LEGAL TRAINING IS NOT REMEDIED BY TRIAL DE NOVO APPEAL.

The provisions of Kentucky and Utah law granting a trial de novo on appeal is not an adequate substitute or remedy for a trial in the first instance before a law trained judge competent to rule on legal issues. In *Ward v. Village of Monroeville*, 409 U.S. 57, (1972), this court ruled that petitioner convicted of two traffic offenses and sentenced to a $50 fine on each offense was denied his right to be tried by a disinterested and impartial judge as guaranteed by Fourteenth Amendment due process where the trial took place before a village mayor empowered by Ohio statute to sit as Judge. The court based its conclusion on the fact that the fines and forfeitures imposed by the mayor as judge went to the village treasury and constitutel a major portion of village funds. The Respondent argued that any error in the trial before the mayor was cured by the availability of trial de novo on appeal. The Court specifically rejected this contention.

> Respondent also argues that any unfairness at the trial level can be corrected on appeal and trial de novo in the County Court of Common Pleas. *We disagree*, this 'procedural safeguard' does not guarantee a fair trial in the mayor's court . . . Nor, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the state eventually offers a defendant an impartial adjudication.

> *Petitioner is entitled to a neutral and detached judge in the first instance.* 409 U.S. at 61-62. (Emphasis Supplied).

Utah like Kentucky has made provision for de novo appeal from the Justice of the Peace Courts. Article VIII, Section 9 of the Utah Constitution and Section 78-3-5 *Utah Code Annotated* (1953) provide for de novo appeal from justice of the peace courts in Utah, as does Section 78-4-17 *Utah Code Annotated* (1953).[3] Counsel for the appellees will undoubtedly rely on *Colten v. Kentucky*, 407 U.S. 104, (1972) for the proposition that this right to a trial de novo in a superior court somehow clears up any constitutional infirmities in the use of non-attorney justices of the peace. However, *Colten* was basically concerned with whether or not on a trial de novo appeal from a justice court to a superior court of general jurisdiction, the superior court could enhance the punishment given the defendant in the justice court. Specifically, the issue was whether *North Carolina v. Pearce*, 395 U.S. 711 (1969) was applicable to de novo appeals. The issue in the instant case, whether a non-attorney judge might preside over a criminal case where a jail sentence might result, was not at issue. In point of fact, *Colten's* appeal was from the imposition of a fine of $10.00 and not a jail sentence. And, the court specifically noted that the trial judge in that Kentucky justice court was a

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[3] In Colten v. Kentucky, 407 U.S. 104 (1972) the Court noted that, following the trial in the Kentucky circuit court on appeal de novo, defendant had further appeals "in the same manner as a person tried initially in the general criminal court," 407 U.S. at 113. In Utah there is no appeal to the Utah Supreme Court from the district court decision except where the case involves the validity or constitutionality of a statute.

lawyer. (407 U.S. at 114 n. 11). The holding of this Court was expressly tied to the *North Carolina v. Pearce* issue:

> We cannot say that the Kentucky trial de novo system, as such, is unconstitutional or that it presents hazards warranting the restraints called for in *North Carolina v. Pearce*, . . . (407 U.S. at 119). (Cf. Marshall, J. in dissent 407 U.S. at 122-127).

Interestingly, the Court in *Colten* conceded that the justice courts, in Kentucky at least, are incapable of according an accused his constitutional rights:

> . . . the inferior courts are not designed or equipped to conduct error-free trials, or to insure full recognition of constitutional freedoms. They are courts of convenience to provide speedy and inexpensive means of disposition of charges of minor offenses. (407 U.S. at 117).

Colten's worth as precedent on the issue in the instant case must be limited to its facts, for as was noted in that case:

> Proceedings in the inferior courts are simple and speedy; and, if the results in *Colten's* case are any evidence, the penalty is not characteristically severe. (407 U.S. at 118).

Your Amicus agrees that to the extent a fine and not a jail sentence is imposed, then trial de novo review may cure any defect in the "simple and speedy" justice of a justice court of convenience. However, where the threat of imprisonment exists, then the defendant must be accorded a trial before an attorney-judge as a matter

of right. Since at that point the potential harm to the accused outweighs any "convenience" factor.

Moreover, as indicated above, *Ward v. City of Monrooville* clearly indicates that trial do novo review is no talisman which makes the constitutional infirmaties recognized by this Court in *Colten* in the inferior courts somehow vanish. The Constitution of the United States *does* demand a fair trial in the "first instance."

In conclusion, the dynamic concept of Due Process of Law as employed in *Gordon* requires that the present system of allowing non-attorney judges to preside over criminal cases where a jail sentence may result be declared unconstitutional as violative of the Fourteenth Amendment to the Constitution of the United States.

POINT II

THE PRACTICE OF HAVING NON-LAWYER JUDGES PRESIDE OVER CRIMINAL CASES IN WHICH A JAIL SENTENCE MAY RESULT PRESENTS A DEFACTO DEPRIVATION OF A CRIMINALLY ACCUSED'S RIGHT TO COUNSEL GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The practice of having non-lawyer judges preside over criminal cases in which a jail sentence may be im-

posed, is a violation of a criminally accused's right to counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution in that non-lawyer judges cannot be assumed to have the ability to understand complex legal arguments.

The practice of allowing lay judges to preside over criminal trials renders the Sixth Amendment right to counsel nugatory and constitutes a violation of due process of law. In *Gideon v. Wainwright*, 372 U.S. 342 (1963), and its companion case, *Douglas v. California*, 372 U.S. 353 (1963) the U.S. Supreme Court held the Sixth Amendment right to the assistance of counsel applicable to the states by incorporation into the Fourteenth Amendment.

Like the judges of the inferior courts of Kentucky, lay justices of the peace in Utah exercise criminal jurisdiction over various and sundry criminal offenses. (Brief of Appellant at 17). Jurisdiction of lay justices in Utah extends over such misdemeanors as petty theft, assault and battery, breach of the peace and all misdemeanors involving up to a $300 fine or six (6) months imprisonment or both. Section 78-5-4 *Utah Code Annotated* (1953).

This Court has held that the right to counsel at trials extends to all indigent criminally accused facing a jail sentence. *Argersinger v. Hamlin*. The fundamental character of this right was reiterated by giving the *Argersinger* decision full retroactive effect in *Berry v. City of Cincinnatti*, 414 U.S. 29 (1973). However, the right to counsel is rendered illusory where counsel

must argue before a judge who is not adequately trained in the law. If a judge is not able to rely on his own knowledge of the legal merit of counsel's argument, he is apt to trust the counsel of the lawyer that he is most familiar with, as he lacks an independent standard by which to judge. This becomes the "rule by fiat" denounced by Dean Pound, when he noted:

> *Administration of Justice According to Law* has six advantages: (1) Law makes it possible to *predict* the course which the administration of justice will take; (2) *Law secures against errors of individual judgment*; (3) Law secures against *improper motives* on the part of those who administer justice; (4) Law *provides* the *magistrate with standards* in which the ethical ideas of the community are formulated; (5) Law gives the magistrate the *benefit* of all the experience of his predecessors; (6) Law *prevents sacrifice of ultimate interests*, social and *individual, to the more obvious and pressing but less weighty immediate interests*. Pound, "*Justice According to Law*," *Essays on Jurisprudence from the Columbia Law Review*, 230 (1963) (Emphasis in Original)

Dean Pound also observed the harmful consequences of rule by fiat:

> With no training in the law, no training in the process of judicial thought, and no mental habit of mind acquired by constant experience in legal reasoning, it would indeed be strange if a [lay judge] did not treat each case as a unique proposition. He has no category or class into which he may place it, no analogies from which to draw to solve the new problem before him. He has no legal rules, principles or standards by which

to judge the merits of the controversy to be decided. Wholly unlike the judge who is trained in the law, he has no precedents to guide him. In deciding the cause before him, the lay judge is necessarily limited by his own personal experience acquired in the short span of a single lifetime. He cannot call on the legal experience of the ages to assist him but is helpless to any more than apply his own personal notions of right and wrong to the case at hand. The justice which such tribunal is capable of dispensing is but the outcropping of the experiences of a personality, often limited and warped by passion and prejudice, and at best, as variable as the personalities of the justices who comprise [the system] . . . Such justice is not justice at all. It is unequal, uncertain, and capricious. Smith, *The Justice of the Peace System*, 15 Cal. L. Rev. 118, 127-128 (1927) quoting from Pound, *Outlines of Lectures on Jurisprudence*, 75 (3rd Ed)

A notable example of who the non-lawyer judge will turn to when a problem arises finds startling effect in Utah. The means provided by the State of Utah to shield the justices from legal error resulting from their lack of learning in the law is a Manual for Justices of the Peace in the State of Utah prepared by Brigitte M. Bodenheimer in 1956. While the manual is written in a lucid and simple style, it is today hopelessly outdated and affirmatively misleading.[4] The non-law trained judge faced with a question of law and no means or ability to resolve it is likely to rely heavily on the representations of the County Attorney. The manual ex-

[4] This manual, we are told, is in the process of being revised and brought up to date.

pressly approves this practice. On page 14 the following advice appears:

> There will no doubt be many occasions, however, when the answer to his problem cannot be found in this book. In such case it is recommended that the justice get in touch with the county attorney of his county who is the legal advisor of the county's precinct officers.

Again at page 59 the manual notes:

> The defendant is often not represented by counsel in a justice court. *County attorneys are accustomed to that fact and are generally able to play the role of both prosecutor and defense attorney with fairness to both sides.* (Emphasis Supplied).

At page 71, The Justice of the Peace is given advice on instructing the jury:

> Sometimes after the justice has finished his instructions to the jury, one or both attorneys may ask him to add further charges to the jury, which the attorney reads to him. The justice then says: 'I so charge' or 'I refuse to so charge.' *If he is in doubt on how to rule, the county attorney, if present, will generally come to his aid.* (Emphasis Supplied).

The effect of this advice in the official Manual is to invite the "neutral" judge to defer, when in doubt, to the decision of one of the litigant's counsel. The right to a decision by an impartial tribunal is denied in fact whenever the untrained judge is called upon to decide a question of law without the knowledge or training to

decide it: in that situation he is officially advised to *rely* upon the prosecutor! Defendant's right to be heard in his own defense becomes his right to be heard by opposing counsel.

A judge who has been a lawyer is in the habit of reading the advance sheets containing state appellate and United States Supreme Court cases as well as law review articles. A layman is not likely to be learned in such complex matters as the rules of evidence. The difficulty of the subject matter of a criminal case is nowhere better exemplified than in the Utah Rules of Evidence where the Hearsay Rule, Rule 63, for example, takes up some 21 pages embodying the Rule itself and the numerous exceptions to the Rule. Other examples become obvious from an even cursory perusal of Volume Eight of the Utah Code Annotated which contains the criminal code and code of criminal procedure.

The proper resolution of complex legal problems is often crucial to the outcome of cases within the justice's jurisdiction. Since the decision in *Mapp v. Ohio*, 367 U.S. 643 (1966), extending the Fourth Amendment's exclusionary rule to the states, this Court alone has decided literally hundreds of cases affecting the criminal trial process. These cases affect such interests, to name only a few, as: the right to be free from unreasonable search and seizure,[5] the prohibition against double jeop-

[5] **Chimel v. California**, 395 U.S. 752 (1969) (limitations on "search incident to arrest"); **Coolidge v. New Hampshire**, 403 U.S. 443 (1971) ("the plain view theory"); **Wong Sun v. United States**, 371 U.S. 471 (1963) (the "fruit of the poisonous tree" doctrine); **Spinelli v. United States**, 393 U.S. 410 (1968) (search warrant affidavits).

ardy;[6] the prohibition against self-incrimination,[7] the admissability of confessions;[8] the right to a "fair" [9] and speedy public trial,[10] including a jury of one's peers,[11] the right to confrontation and cross-examination;[12] the right to counsel;[13] and fair treatment in sentencing.[14]

As stated by the editors of the *Criminal Law Reporter*.

> From the 1960-61 term through the 1968-69 term, with the Fourteenth Amendment as a lever,

[6] **Ashe v. Swenson**, 397 U.S. 436 (1970) (collateral estoppel doctrine).

[7] **Griffin v. California**, 380 U.S. 436 (1965) (barring comment on failure to testify).

[8] **Miranda v. Arizona**, 386 U.S. 436 (1966) (procedural protections afforded during custodial interrogation); **Jackson v. Denno**, 378 U.S. 368 (1964) (determination of "voluntariness" of confessions).

[9] **Smith v. Hooey**, 393 U.S. 374 (1969) (unrelated incarceration does not abrogate right).

[10] **Walster v. California**, 394 U.S. 440 (1969) (the "totality of the circumstances" test for due process).

[11] **Baldwin v. New York**, 399 U.S. 66 (1970) (sixth amendment right to jury trial in misdemeanors).

[12] **Pointer v. Texas**, 380 U.S. 400 (1965) (invalidating use of prior testimony without opportunity for cross-examination).

[13] **Argersinger v. Hamlin**, 407 U.S. 67 (1972) (right to counsel in misdemeanors).

[14] **Tate v. Short**, 401 U.S. 395 (1971) (bars conversion of fine to imprisonment); **Boykin v. Alabama**, 395 U.S. 238 (1969) (waiving of rights in guilty pleas).

> nearly all the guarantees of the Fourth, Fifth and Sixth Amendments have been made binding upon the states. At the same time, numerous U.S. Supreme Court decisions have strengthened these guarantees. The court's extension of the mantle of federal protections to persons accused in State criminal proceedings and its bolstering of these protections have brought about dramatic changes in the criminal law.

It is safe to predict that changes in the criminal law will continue to be a source of increasing complexity and controversy in the criminal process. Moreover, resolution of cases within the jurisdiction of inferior courts requires not only ability to understand a highly complex, controversial and changing body of law, but also the ability to disregard the truthfulness and probative value of illegally obtained evidence which has been heard in its full and potentially incriminating detail. Because of the inability of the lay person to segregate the issue of truthfulness from the issue of admissibility and the issue of admissibility from the issue of guilt, the responsibility for making these determinations cannot constitutionally be delegated to a jury.[15]

Thus, the presence of defense counsel in court, his presentation of evidence, and his argument about the legal standards and matter of evidence is apt to fall

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[15] **Jackson v. Denno**, 378 U.S. 368 (1964) (procedure that leaves the factual determination of the voluntariness of a confession to the jury held to be invalid in view of the confession either in determining admissibility or n determning guilt) and **Bruton v. Unted States**, 391 U.S. 123 (1968) (co-defendant's confession inculpating the defendant cannot be used in a joint trial even if jury specifically instructed that confession was admissible only against the declarant).

upon deaf ears where the judge lacks an independent standard to apply. Since arguments based upon recent cases decided by this Court and State Courts in areas of constitutional law, as well as simple evidentiary matters, may not be comprehended by the lay judge, the constitutional guarantee of due process cannot be accorded the defendant. Due process of law requires not only that a person exercising a judicial function be fair and impartial but also that he be competent. The wisdom of the words of Justice Sutherland speaking for the Court in *Powell v. Alabama*, 287 U.S. 45, 69 (1932) decided over forty years ago are apposite in the instant case:

> Even the intelligent and educated layman has small and sometimes no skill in the science of the law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and the knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much, more true is it of the ignorant and illiterate, or those of feeble intellect.

The right to counsel at trial is equally as important to the preservation of justice in misdemeanors as in felony proceedings. ***Argersinger v. Hamlin***, supra. As Chief Justice Burger observed, concurring in ***Argersinger***:

> [A]ny deprivation of liberty is a serious matter. The issues that must be dealt with in a trial for a petty offense or a misdemeanor may often be simpler than those involved in a felony trial and yet be beyond the capability of a layman, especially when he is opposed by a law-trained prosecutor. There is little ground, therefore, to assume that a defendant unaided by counsel, will be any more able adequately to defend himself against the lesser charges that may involve confinement than more serious charges. Appeal from a conviction after an uncounseled trial is not likely to be of much help to a defendant since the die is usually cast when judgment is entered on an uncounseled trial record. (407 U.S. at 41).

It is clear, therefore, that Justice Courts in this Country cannot find justification from the fact that lay judges in justice courts are limited to trials of misdemeanors carrying a maximum penalty of six months imprisonment as is the case in Utah or 12 months as in Kentucky. The distinction between so-called "petty" and "serious" offenses has been expressly limited by this Court to the right to jury trial (by reason of the unique legal history of the jury) and has been notably rejected

as inapplicable to other due process rights in misdemeanor cases.[16]

For the same reasons a lay person can no longer be considered competent to preside over the criminal trials were a jail sentence may result within the jurisdiction of the Justice Courts of this Country. The right to counsel in these cases necessarily includes the right to a competent law trained tribunal to hear counsel. To conclude otherwise is to continue a system which requires that indigent criminal defendants must be provided with counsel who are attorneys but not that they must be provided with judges who are attorneys. This conclusion posits that the role of the judge who must decide or preside over a criminal case is less crucial and less constitutionally significant than the role of the counsel who must argue it. Your Amicus submits that this cannot be so.

The California Court's, obvious reliance on ***Argersinger*** in ***Gordon v. Justice Court***, lends credence to this assertion, and it is respectfully submitted that the Sixth Amendment Right to Counsel as applied to the States through the Fourteenth Amendment demands not only counsel at the side of the accused, but an attorney-judge presiding over the trial who is able to adequately respond to counsel when imprisonment may result from the charge.

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[16] **In re Oliver**, 333 U.S. 257 (1948) (right to public trial); **Pointer v. Texas**, 380 U.S. 400 (1965) (right to confrontation); **Washington v. Texas**, 388 U.S. 14 (1967) (right to compulsory process to secure attendance of witnesses); **District of Columbia v. Clawans**, 300 U.S. 617 (1937) (right to cross-examine).

CONCLUSION

The practice of allowing lay judges to try cases that affect the liberty of the accused violates the constitutional rights of those against whom, by an accident of geography, a complaint is filed in areas where a lay judge is sitting. The unfamiliarity of lay judges with criminal law and procedure necessarily results in such a lack of adherence to the legal precedents which are applied in other courts that the accused are deprived of due process of law and equal protection as required by the Fourteenth Amendment to the United States Constitution. In addition, the barrier to defense counsel's communication with an untrained judge as to the rules and legal nuances governing the defendant's rights, results in a de facto deprivation of the Sixth Amendment right to counsel as made applicable to the States by incorporation into the Fourteenth Amendment. Although large numbers of persons each year receive their first impressions of the American System of Criminal Justice in courts where non-lawyer judges preside, these courts, by and large, fail to meet professional standards of criminal law and procedure. Finally, the development of modern means of transportation and communication and the availability of sufficient numbers of professionally trained peresonnel, coupled with the current trend away from lay judge courts, should result in the discarding as a violation of due process of law such an antiquated system which was utilized as an expedient

to meet Eighteenth Century, not Twentieth Century, conditions.

Respectfully submitted,

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APPENDIX

APPENDIX I

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LARRY J. SHELMIDINE and JOHN F. REEVES, on their own behalf and on behalf of all others similarly situated in Salt Lake County, Utah,

Plaintiffs,

CHARLENE POLLY COOK,

Intervening Plaintiff;

VS.

CHARLES A. JONES in his capacity as Justice of the Peace of Precinct 4 of Salt Lake County, Utah; LYNN D. BERNARD, RALPH CHILDS, LYLE GUNDERSON, WAYNE GUNDERSON, GERALDINE CHRISTENSEN, HENRY H. PRICE, WARREN D. COLE, REX C. CONRADSON, ELMAR L. JOHNSON, all in their capacity as Justices of the Peace for Precincts in Salt Lake County, Utah,

Defendants.

MEMORANDUM DECISION

Case No. 224948

Plaintiffs challenge the practice of permitting non-lawyer justices of the peace to hear misdemeanor

cases in which a jail sentence could be imposed.[1] This challenge is founded upon three bases: That Due Process under the Fifth and Fourteenth Amendments of the United States Constitution requires that judges in criminal cases in which imprisonment may be imposed be lawyers; that the practice of permitting most of the justices of the peace throughout the state to be non-lawyers while at the same time requiring that judges of the city courts, whose jurisdiction is the same as the justice courts with regard to this type of offense, be lawyers, constitutes a denial of equal protection under the Fourteenth Amendment of the Constitution of the United States; that the right to counsel and, more fundamentally, the right to a fair trial, mandated by the Sixth and Fourteenth Amendments of the Federal Constitution are abridged and denied by allowing non-lawyer or lay judges to preside in any criminal case in which a jail sentence may be imposed.

By virtue of the foregoing assertions, plaintiffs are asking this Court to prohibit the defendants, each of whom is a non-lawyer or lay justice of the peace, from hearing cases involving the plaintiffs in which each

1 Section 78-5-4, Utah Code Annotated, provides that:

"Justices' courts have jurisdiction of the following public offenses committed within the respective counties in which such courts are established:

(1) Petty larceny.

(2) Assault or battery not charged to have been committed upon a public officer in the discharge of his duties or to have been committed with such intent as to render the act a felony.

(3) Breaches of the peace, committing a wilful injury to property, and all misdemeanors punishable by a fine less than $300 or by imprisonment in the county jail or municipal prison not exceeding six months or by both such fine and imprisonment."

Section 76-3-301 provides that a fine of $299 may be imposed upon a conviction of a Class B or C misdemeanor or infraction. Section 76-3-204 provides that the sentence for a Class B misdemeanor may be for a term of imprisonment not exceeding six months and for a Class C misdemeanor for a term not exceeding 90 days. Under Section 76-3-205, no person convicted of an infraction may be imprisoned.

plaintiff is charged with the commission of a misdemeanor offense, the conviction of which could result in imprisonment.[2] Both plaintiffs and defendants have moved for summary judgment and, to that end, have stipulated that there are no material facts in dispute. Those stipulated facts are more fully set out in the memoranda filed by the respective parties with two minor exceptions noted in the record during oral argument, about which there is likewise no dispute which raises any issue of fact.

Justices of the peace courts in Utah, manned by non-lawyer judges, are courts of convenience, particularly in isolated rural areas typical of most of this state in which there are few, and sometimes no attorneys. In the early days of statehood there were so few attorneys and such great distances to be covered by those attorneys who were available that the system of justice in dealing with minor criminal offenses would have broken down completely if lawyer judges had been required. Thus, while city court, district court and Supreme Court judges were, from the inception of statehood and before, required to be lawyers, both the Constitution of the state of Utah and legislative enactment left open the question of qualifications of the judges of justice courts with respect to legal background and training.

Modern transportation and communication have considerably alleviated much of the problem earlier encountered in effectuating a viable means of administering effective and speedy justice on the misdemeanor level. Nevertheless, of the 29 counties in Utah there are

2 Plaintiffs Shelmidine and Reeves are charged with the crime of driving under the influence of intoxicating liquor, as is intervening plaintiff Cook, in violation of Section 41-6-44. This is a Class B misdemeanor.

still eight counties with two or less resident attorneys and five counties with no resident attorney, for lawyers, whose livelihood is dependent upon the services they are able to render to people, have tended to settle in the more populous regions of the state, requiring the inhabitants in many areas to travel some considerable distance to obtain legal counsel. The impact of this on the administration of misdemeanor offenses—the very type of offense with which a limited-jurisdiction, lay justice of the peace most frequently deals—is immediately apparent: One-third of the counties of the state do not have enough resident lawyers to staff the justice courts and still have a prosecutor and defense counsel. In Salt Lake County, where the heaviest concentration of lawyers is found, only one justice court judge is a lawyer.

With this background, the question before this court is whether the historically convenient and necessary lay justice of the peace system in Utah can withstand the developing mandates of Due Process, of fundamental fairness and of equal protection. The basic predicate is not whether a lay justice of the peace can conduct an error-free trial or whether he is capable of being fair and impartial, for Due Process does not guarantee an error-free trial, *Roberts vs. New York City* 295 U.S. 264 S.Ct., L.Ed. 2d (1934), nor does this Court have any doubt that for the most part lay justices of the peace are fully capable of fairness and impartiality. Rather, it is whether a non-lawyer judge has sufficient legal training, background and experience to afford a misdemeanant a fair trial, the end result of which may be imprisonment. In this context, "fairness" does not mean merely impartiality. Its meaning is of constitutional necessity more encompas-

ing. It alludes to a quality of justice which fully observes all rights, both substantive and procedural, of the citizen-defendant who has been charged with an offense against the society in which he lives, no matter how petty. Ideally, one would hope for an entire judiciary staffed with learned judges who, by intellect and passion, are able to discern the delicate and subtle nuances extant in our constitutional system by which the rights of the individual are balanced against the power of the government. While the ideal may not be perfectly met, we come as close as humanly possible by imposing rigorous standards of training, background, experience and temperament on our judges to achieve the highest quality of justice possible. To impose less than that does not meet the fundamental constitutional requirements of Due Process for a constitutionally fair trial where loss of liberty is a possible consequence. Due Process permits no compromise between fundamental rights on the one hand and convenience or necessity on the other.

If one is entitled, under the growing concepts of Due Process and fair trial, to legal counsel in a misdemeanor case where there is a possibility of imprisonment, *Argersinger vs. Hamlin,* 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed. 2d 530 (1972), see also *Gideon vs. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963), then Due Process, the right to a fair trial and the right to counsel likewise mandate that under such circumstances only a lawyer-judge, qualified by training, background and experience to comprehend and utilize counsel's legal arguments, can impose a sentence of imprisonment, *Gordon vs. Justice Court,* 115 Cal. Rptr. 632, 12 Cal. 3d 323, 525 P.2d 72 (1974), cert. den. 16 Cr.L. 1483, 1484 (1975).

The defendants nevertheless argue that the "two-tiered" system in Utah of *de novo* appeals meets the requirements of Due Process, if only after and by virtue of an appeal "anew" to a lawyer-judge, and thus saves the system from any constitutional infirmity. But must a defendant incur the added expense, both in time and money, of an appeal in order to be afforded Due Process: I think not. The availability of a trial *de novo* on appeal does not guarantee a fair trial *in the justice court,* the court with which we are here dealing. Plaintiffs are entitled to Due Process and a fair trial in the first instance. *Ward vs. Village of Monroeville,* 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed. 2d 267 (1972).

This Court therefore finds and holds that the practice under Utah law which allows non-lawyer or lay justices of the peace to impose a jail sentence or imprisonment constitutes a denial of a criminal defendant's right to a fair trial in violation of the mandate of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. To the extent that Section 78-5-4, Utah Code Annotated, authorizes lay justices of the peace to impose imprisonment, it, too, is violative of the guarantees under the Federal Constitution of Due Process, of the right to fair trial and of the right to counsel, and is void.[3]

Accrodingly, defendants' motion for summary judgment is denied, plaintiffs' motion for summary

3 It is unnecessary to address the question of whether a lay judge can impose a fine since the only matter presently before this Court is whether a lay judge can affect the "liberty" of a defendant by imprisonment.

judgment is partially[4] granted, and the defendants are prohibited as lay judges from imposing imprisonment or jail sentences upon a conviction of the offenses over which they otherwise have jurisdiction. Counsel for the plaintiffs are directed to prepare and submit an Extraordinary Writ in the nature of prohibition in accordance with this memorandum decision.

Dated this 3rd day of June, 1975.

BY THE COURT:

Stewart M. Hanson, Jr.
District Judge

4 It is granted "partially" because, while the plaintiffs seek to have this Court prohibit the defendants from *hearing* any criminal matter which may result in imprisonment, this decision only goes so far as to prohibit the defendants from *imposing* imprisonment.

JUSTICES' COURTS

1975

FIRST SPECIAL SESSION

Engrossed Copy

H. B. No. 1 By Milly O. Bernard, Harold T. Newman, Del L. Buckner, C. DeMont Judd, Jr.

An act amending Section 78-5-4, Utah Code Annotated 1953; relating to justice of the peace courts; establishing the right of a defendant in a criminal case to be tried and sentenced by a judge who is a member of the Utah State Bar; providing that a justice who is not a member of the Utah State Bar may try and sentence any devendant who waives that right; providing for transfer if a waiver is not entered; establishing the basis upon which the prosecution may obtain a transfer from such a justice; providing for hearings before district court judges as judge *pro tempore*; and providing that a presiding judge may, as an alternative to having those matters heard before district court judges in his district, appoint a member of the Utah State Bar Association to hear those matters.

Be it enacted by the Legislature of the State of Utah:

Section 1. Section 78-5-4, Utah Code Annotated 1953, is amended to read:

78-5-4. (a) Justices' courts have jurisdiction of the following public offenses committed within the respective counties in which such courts are established:

(1) Petit larceny.

(2) Assault or battery not charged to have been committed upon a public officer in the discharge of his duties or to have been committed with such intent as to render the act a felony.

(3) Breaches of the peace, committing a willful injury to property, and all misdemeanors punishable by a fine less than $300 or by imprisonment in the county jail or municipal prison not exceeding six months, or by both such fine and imprisonment.

(b) (1) Notwithstanding any provision of this code relating to jurisdiction or venue of justice courts, every defendant shall be accorded the right to be tried and sentenced by a judge who is a member of the Utah state bar in any matter wherein the judge may have the option of imposing a jail sentence. If, upon being advised of this right at the time of arraignment, the defendant waives this right, the judge may then proceed to hear the matter and, where warranted, may impose a jail sentence. Unless such a waiver is executed by the defendant, the case shall be forthwith transferred to the nearest or most convenient court in that county, which is presided over by a judge who is a member of the Utah state bar.

(2) Even though a defendant has waived his rights as set forth in subparagraph (1) of this subsection, if the prosecution moves for a transfer to a judge who is a member of the Utah state bar and the defendant will consent to that transfer, the matter shall be forthwith transferred.

(3) Any district judge to whom a case is transferred pursuant to this subsection shall hear the matter as justice of the peace *pro tempore*.

(c) The presiding judge of the district court of any

judicial district may provide for the appointment of a justice of the peace *pro tempore*, who is a member of the Utah state bar, to hear any matters transferred pursuant to subsection (b) of this section, except in the case of municipalities, the governing body of the municipality shall appoint the justice of the peace *pro tempore* for cases arising out of violations of municipal ordinances.

(d) If any provision of this act, or the application of any provision to any person or circumstance, is held invalid, the remainder of this act shall not be affected thereby.

(e) This act shall take effect upon approval.

Supreme Court, U. S.
FILED
AUG 6 1975
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1975

No. 74-1409

LONNIE NORTH,

Appellant,

vs.

C. B. RUSSELL, et al.,

Appellees.

ON APPEAL FROM THE
COURT OF APPEALS OF KENTUCKY

BRIEF *AMICI CURIAE* OF THE PETITIONERS AND CLASSES OF PETITIONERS IN WYSE v. HOPKINS AND IN SANCHEZ v. TONKIN

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In The

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LONNIE NORTH,

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BRIEF *AMICI CURIAE* OF THE PETITIONERS AND CLASSES OF PETITIONERS IN WYSE v. HOPKINS AND IN SANCHEZ v. TONKIN

INTEREST OF *AMICI CURIAE**

The *amici curiae* are the petitioners and the classes of petitioners represented by them in two proceedings currently pending in the Supreme Court of the State of New York, *In the Matter of the Application of Edward R. Wyse, Sr., Individually*

*Counsel for both the appellant and the appellees have consented to the filing of this brief. Copies of their letters of consent have been filed with the Clerk.

and on Behalf of All Other Persons Similarly Situated, for a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules v. Leon Hopkins, as Justice of the Justice Court of the Village of North Hornell and on Behalf of All Other Non-Attorney Justices of Justice Courts and New York State Association of Magistrates, Index no. 34986 (Steuben Co.), and *In the Matter of the Application of Jose Sanchez, on his own behalf and on behalf of all other persons similarly situated, for a determination pursuant to Article 78 of the Civil Practice Law and Rules v. Hon. William M. Tonkin, as Justice of the Justice Court of the Town of Hartsville, and on behalf of all other non-attorney justices of justice courts*, Index no. 8395-75 (Monroe Co.).

Both of those cases were brought by persons charged with offenses for which they could be sentenced to jail if convicted, and in which their only trial would be before a justice who is not an attorney-at-law. Both of the named petitioners have been jailed before trial by a lay justice and released pending trial.* A motion to consolidate the two proceedings has been made and is scheduled to be heard shortly before a Justice of the Supreme Court of the State of New York before whom *Wyse v. Hopkins* has been pending since early 1975.

In both cases the petitioners are challenging Article VI, section 20(c) of the Constitution of the State of New York, which leaves the requirements for holding the position of Justice in a Justice Court to the Legislature of the State of New York, and section 105(a) of the Uniform Justice Court Act of the State of New York, which implements the state constitutional provision by permitting non-attorneys to sit as Justices of Justice Courts. Both cases are brought pursuant to section 1005 of the New York Civil Practice Law and Rules as class actions on behalf of a class of all persons who are now or may in the future

*The petitioner in *Sanchez v. Tonkin, supra*, was jailed by a different lay justice in a separate but related matter to the matter currently pending.

be defendants in any proceeding where upon conviction they would be subject to imprisonment where that proceeding is or will be heard before a Justice of a Justice Court in the State of New York who is not an attorney-at-law admitted to practice before the courts of the State of New York. The cases are also brought against a class consisting of all persons who are now or who may in the future be Justices of Justice Courts in the State of New York and who are not attorneys-at-law admitted to practice before the courts of the State of New York while serving as Justices.

As in this case, the petitioners in the New York cases contend that a system of lay justices conducting proceedings in which defendants can be sentenced to jail upon conviction violates the Fourteenth Amendment to the Constitution of the United States. The decision by this Court in this case may substantially determine the result in the proceedings pending in New York, and it is to bring to the Court's attention the way in which the lay justice system operates in New York and to present argument in support of the position of the appellant Lonnie North that this brief *amici curiae* is filed.

ARGUMENT

The Lay Justice System Violates the Due Process Clause of the Fourteenth Amendment to the Constitution.

The lay justice system violates the due process clause of the Fourteenth Amendment to the Constitution of the United States. The essence of due process, especially in a prosecution in which the defendant can be sentenced to jail if found guilty, is that there be a hearing conducted "in a meaningful manner." *See Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). The trial judge in a criminal case must be intimately conversant not merely with the plethora of substantive and procedural statutes governing criminal cases, but also with the binding precedents of the appellate courts of his state and of this Court, plus whatever decisions from the federal courts of the particular jurisdiction may ultimately affect a defendant's criminal conviction. It is beyond cavil that a person acting as a part-time judge could not adequately master such a body of law with little or no formal legal training, and no higher education; such a person is plainly not "learned in the law."*

Moreover, the role of the trial judge goes beyond simply being "an automaton who insures that technical rules are adhered to. [He is] charged with the duty of insuring that justice, in the broadest sense of that term, is achieved in every criminal trial." *Faretta v. State*, —U.S.—, 43 U.S.L.W. 5004, 5014 (U.S. June 30, 1975; Burger, C.J., dissenting). Even if the Constitution, statutes and rules are technically complied with, there is no assurance that justice will be done. As Professor Maguire commented about an eighteenth century attempt to disband the lawyer dominated courts in Massachusetts, the people of that

*State courts faced with requirements that judges be persons "learned in the law" or the like have almost uniformly held that a person must be an attorney to so qualify. *See, e.g. Opinion of the Justices*, 279 Ala. 38, 181 So. 2d 105 (1965); *State v. Schmahl*, 125 Minn. 533, 147 N.W. 425 (1914); *Jamieson v. Wiggin*, 12 S.D. 16, 80 N.W. 137 (1899).

Commonwealth had apparently forgotten that "The Salem witch trials of 1692 were held before judges none of whom was a lawyer. . . ." J. Maguire, *The Lance of Justice*, at 8 (1928).

An examination of the court systems in which lay justices are allowed to preside at criminal trials demonstrates that those lay justices, as a general rule, cannot reasonably be expected to conduct criminal proceedings in the "meaningful manner" required by due process. Because this case has substantial implications for the similar actions pending in New York State we call to the Court's attention certain facts which have been developed on the record in *Wyse v. Hopkins*, Index no. 34986 (N.Y. Sup. Ct. Steuben Co.).

In that action the intervenor respondent New York State Association of Magistrates has introduced in defense of the lay justice system a survey which it conducted to determine the educational qualifications of lay justices in New York. Six percent (6%) of the lay justices have only a grade school education, forty-seven percent (47%) have only a high school education, and twenty-eight percent (28%) have only an associate's degree (two years of college.)* In total eighty-one percent (81%) thus have less than the amount of college education which is a prerequisite for admission to most law schools and the Bar of most states, including New York.**

Although New York does require that non-attorney justices take a training course prescribed by the Administrative Board of the Judicial Conference, prior to taking such a course the lay

*Affidavit of Eugene W. Salisbury, Esq., sworn to January 24, 1975, in *Wyse v. Hopkins, supra*, as supplemented by Brief in Support of Motion to Dismiss.

**New York requires that an applicant for admission to the Bar examination have completed three (3) years of post-secondary education, or its equivalent, before even commencing the study of law. Section 520.3 of the Rules of the N.Y. Court of Appeals for the Admission of Attorneys and Counselors-at-law.

justice can conduct court anyhow. N.Y. Uniform Justice Court Act, section 105(a). The content of such courses and the examinations given in them hardly serve to prepare a layman, usually without a college degree or even any college training, to conduct criminal trials in 1975.

New York's basic course for lay justices consists of six days of classes, of which a total of about three days are spent on courses relevant to criminal cases (some of that three days includes training in subjects material to both civil and criminal cases, such as evidence, and only thirteen hours is devoted to strictly substantive and procedural criminal law).* The typical materials distributed to the lay justices at these training courses are largely copies of statutes and forms; the sole case law material or material akin to that studied in a law school program is a "Sample of Cases and Materials — Distributed at Basic Program" prepared by the Administrative Board of the Judicial Conference consisting of a copy of one case from the New York Court of Appeals, one case from the Appellate Division of the Supreme Court of the State of New York, and copies of nineteen pages (4 pages from the table of contents and 15 substantive pages, namely pp. 1-13 and 85-86) from Maguire, Weinstein, Chadbourn and Mansfield, *Evidence* (5th ed. 1965).** The cursory nature of the course is exacerbated further by the fact that a lay justice is only required to attend eighty percent (80%) of the scheduled classes, or 4.8 of the six (6) days. N.Y. Uniform Justice Court Rules, section 30.6.

After taking the course the lay justices take a true-false test on which the passing grade is said by the New York State

*Reply Affidavit of Rene H. Reixach, sworn to January 22, 1975, ¶ 2 in *Wyse v. Hopkins, supra*, based on material produced by Administrative Board of the Judicial Conference in response to a request for the production of documents.

**Id.*, ¶ 5.

Association of Magistrates to be 70.* The tests are rudimentary to say the least. A copy of the questions from the test used in November, 1974, is annexed hereto in the Appendix.** Among the questions was the following: "In a non-jury trial in Justice Court the prosecution is not required to prove the defendant guilty beyond a reasonable doubt." (Question 16). A test with questions so simplistic as that, of which only about seventy percent (70%) apply to criminal cases (including questions applicable to trials generally), is no test at all and surely cannot assure criminal defendants of a meaningful hearing before a judicial officer capable of dealing with the complexities of modern criminal law.***

When a criminal defendant is forced to be tried before a lay justice the right to counsel becomes meaningless. While the cases heard before lay justices are limited to misdemeanors and petty offenses, those cases "often bristle with thorny constitutional questions." *Argersinger v. Hamlin*, 407 U.S. 25, 33 (1972).****

This Court has recognized that there is a distinction between a Judge and a lay clerk, *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); and in *Shadwick v. City of Tampa*, 407 U.S. 345 (1972), this Court held that a lay person can only perform judicial functions if he is "capable of determining [the issues]." (*Id.*, 407 U.S. at 350). Plainly a lay justice is not capable of

*Affidavit of Eugene W. Salisbury in *Wyse v. Hopkins, supra*.

**Reply affidavit of Rene H. Reixach in *Wyse v. Hopkins, supra*, ¶ 4, Exhibits C-14 through C-18.

***In one recent case a lay justice testified that in preliminary proceedings "he has never assigned counsel in a felony case and does not believe he has any right to do so," which a higher court found "clearly shows his complete lack of understanding and comprehension of the Criminal Procedure Law. . . ." *People* v. *Hurlburt*, No. C-160-S (N.Y. Co. Ct. Allegany Co. Sept. 17, 1974), pp. 1, 3.

****For example, in *Wyse v. Hopkins, supra*, the harassment charge is based on alleged invective virtually identical to that in *Gooding v. Wilson*, 405 U.S. 518 (1972). *Cf. Lewis v. New Orleans*, 415 U.S. 130 (1974); *Cohen v. California*, 403 U.S. 15 (1971).

determining legal questions with what is at best cursory legal training; he is not "legally competent," a basic element of due process. *Powell v. Alabama*, 287 U.S. 45, 68 (1932). If as has been suggested, "in all but an extraordinarily small number of cases an accused will lose whatever defense he may have if he undertakes to conduct the trial himself," *Faretta v. State, supra*, that is even more so if it is the trial justice rather than or in addition to the defendant who is not an attorney.

The state of justice before such lay justices has been criticized even by official studies of the court system. As the Report of the Temporary Commission on the New York State Court System, Part I, ". . . And Justice for All" (1973) stated,

> The judges in local courts are part-time and often untrained in the law. Although non-lawyer judges are required to attend legal orientation and refresher courses given by the judicial conference, it is questionable whether such a program can prepare a judge to protect adequately the rights of individuals . . . .(p.23)

So also the American Bar Association's *Standards Relating to Court Organization* (1974), establishes as a minimum professional qualification for a judge that he "should have been admitted to the bar." (§1.21(a)).

Faced with a similar system of lay justices, some of whom had at least been trained, as in New York, but unlike Kentucky and the case of the untrained appellee C.B. Russell, the California Supreme Court concluded that "the failure to provide a judge qualified to comprehend and utilize counsel's legal arguments . . . must be considered a denial of due process." *Gordon v. Justice Court*, 115 Cal. R. 632, 12 Cal. 3d 323, 332, 525 P.2d 72 (Cal. 1974), *cert. denied sub nom. California v. Gordon*, — U.S.—, 95 S.Ct. 1148 (1975). This Court should reach the same result, particularly here where the appellee admittedly had no legal training at all (Appendix at 15-16).

CONCLUSION

For the above stated reasons the judgment below should be reversed.

August 6, 1975

Respectfully submitted,

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APPENDIX A
BASIC EXAMINATION

OFFICE OF COURT ADMINISTRATION
JUSTICES' TRAINING PROGRAM

Name .....
Title .....
School Attended ..... Date .....

Answer all questions "true" or "false" on the line at the end of the question.

1. In the trial of a misdemeanor case in Justice Court the prosecution may demand a jury trial. .....
2. A husband accused of harassment by his wife may be immediately tried in Justice Court. .....
3. A Justice may not dismiss a criminal charge unless the District Attorney consents to such dismissal. .....
4. A civil summons issued out of Justice Court may be served anywhere within the home county of the court or any county adjoining said home county. .....
5. A 20 year old person may be adjudicated a youthful offender. .....
6. The fact that the defendant refused to submit to a chemical intoxication test may be used as evidence against him upon his trial in Justice Court for driving while intoxicated. .....
7. A defendant convicted of assault in the third degree in Justice Court may be fined $100 and discharged upon the condition that he avoid disreputable people and places. .....

A defendant is entitled to trial by jury in Justice Court in the following cases:

8. Harassment .....
9. Driving While Ability Impaired .....
10. Reckless Driving .....
11. If a Justice has a uniform traffic ticket, a signed and witnessed information, a proper speedometer calibration sheet and a supporting deposition before him he may convict the defendant of speeding without a trial even though the defendant pleaded not guilty. .....
12. A Justice may adjudicate an 18 year old person charged with assault in the second degree a youthful offender. .....
13. In a summary proceeding to recover possession of real property, a Justice may grant judgment for rent due in excess of $1,000. .....
14. In a trial for public intoxication in Justice Court a non-medical witness may testify that, in his opinion, the defendant was intoxicated. .....
15. The Civil Practice Law and Rules (CPLR) has no application in Justice Court. .....
16. In a non-jury trial in Justice Court the prosecution is not required to prove the defendant guilty beyond a reasonable doubt. .....
17. Before a defendant may be convicted of driving while intoxicated in Justice Court the prosecution must prove that a chemical test was administered to the defendant and that such test disclosed that the defendant had in excess of fifteen-hundreds of one per centum by weight of alcohol in his blood. .....

18. In a civil jury trial in Justice Court if five jurors agree the jury may render a verdict in favor of plaintiff. .....

19. An accused may be arraigned and tried in Justice Court when the Justice has the motorist's copy of a uniform traffic ticket before him regardless of whether or not the simplified information has been filed. .....

20. An indigent defendant, charged with a traffic infraction, who has not been afforded an assigned counsel, may be imprisoned upon conviction. .....

21. A witness need have no special expertise other than being a police officer in order to be considered an expert and to have his opinion as to the speed of a vehicle admitted into evidence. .....

22. A Justice may legally perform a marriage ceremony where the man and woman are 18 years old, provided that the parents attend and consent. .....

23. An opinion of the Court of Appeals supersedes two opinions of the Appellate Divisions construing the same point of law but with an opposite result. .....

24. In a jury trial in Justice Court part of the jury's function is to determine whether or not physical evidence was legally seized. .....

25. When a trial is held before the Justice, without a jury, minutes of the trial need not be kept. .....

26. Bail should always be set as high as possible in order to impress the seriousness of the charge upon the defendant. .....

27. The New York State Supreme Court is the highest Appellate Court in the State. .....

28. A Town or Village Justice who has no cases and collects no money in a given month is not required to submit a report to Audit and Control. .....

29. The testimony of a person who has been previously convicted of a felony is inadmissible in Justice Court. .....

30. The fact that the defendant was issued a uniform traffic ticket by a police officer for speeding gives rise to the presumption that the defendant was speeding. .....

31. A writ of error *coram nobis* may be employed to vacate a judgment of conviction in Justice Court upon the grounds that an error in fact not appearing on the trial record occurred. .....

32. An appeal from a conviction in Justice Court is considered taken when the defendant files an affidavit of errors with the Court within 30 days of the judgment of conviction. .....

33. If the Justice feels that the affidavit of errors in question 32 has no merit he is not required to do anything further. .....

34. The Statute of Frauds is a group of laws enacted by the Legislature which require certain contracts to be in writing. .....

35. The accuracy of a radar device is so scientifically acceptable that no evidence as to its calibration is necessary at a speeding trial. .....

36. A Justice may refuse to issue a civil summons for a plaintiff when he feels that the plaintiff can afford a lawyer. .....

37. When a Justice is busy all week he may properly schedule a non-jury trial for a Sunday. .....

38. In deciding whether to release, remand or bail a defendant after arraignment, the Justice is required to follow the wishes of the District Attorney. .....

39. Before accepting a guilty plea for speeding the Justice is required to inform the defendant that, in addition to a penalty, his license is subject to suspension or revocation as provided by law. .....

40. In a criminal jury trial the Justice is required to charge the jury only when requested to do so by the defendant. .....

41. Upon a trial in Justice Court the Justice is entitled to a fee of 25 cents for each witness he swears in. .....

42. A Justice should attempt to handle as many cases as possible so that he can demand a salary increase from his Town or Village Board. .....

43. In order for hearsay evidence to be admitted into evidence in Justice Court it must be in affidavit form sworn to before a notary public. .....

44. A youth of 15 years may be tried and convicted in Justice Court if he is charged with the commission of a misdemeanor. .....

45. Once a defendant pleads guilty a Justice has no power to allow that plea to be withdrawn and a not guilty plea substituted. .....

46. In the absence of the District Attorney upon a trial it is mandatory for the Justice to cross-examine all witnesses. .....

47. If a defendant charged with a misdemeanor applies to a higher court for the intervention of a grand jury no further proceedings may be had in Justice Court until that issue is decided. .....

48. In fixing sentence the Justice's sole consideration should be the punishment of the defendant for committing the offense. .....

49. A private citizen may properly arrest a person only when that person has committed a felony. .....

50. In a criminal jury trial in Justice Court the prosecution and defense may properly agree to a jury composed of five persons. .....

If you wish to make any observation or suggestion about the Program please do so:

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74-1409

Supreme Court, U. S.
FILED
AUG 4 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-4109

LONNIE NORTH - - - - - Appellant

Vs.

C. B. RUSSELL; NATHANIEL "TRAP" HELTON, JAILER OF HARLAN COUNTY - - - - - Appellees

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ON APPEAL
FROM
COURT OF APPEALS OF KENTUCKY

BRIEF OF AMICUS CURIAE KENTUCKY BAR ASSOCIATION

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IN THE

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OCTOBER TERM, 1975

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ON APPEAL
FROM
COURT OF APPEALS OF KENTUCKY

BRIEF OF AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The Kentucky Bar Association, by an act of the Kentucky General Assembly, KRS 30.170, (Appendix, pp. 2a, 3a) is an administrative agency of the Kentucky Court of Appeals governing members of the bar by Rule 3 of that court. All persons practicing law in this state must be members in good standing of the Kentucky Bar Association.

In the course of lawyers practicing their profession, it becomes necessary for them to appear in city police courts in Kentucky cities below the second class pre-

sided over by judges who are not lawyers. A lawyer's knowledge of the operation of the Kentucky lower court system and the effect of such a system on his practice of law under ethical standards of practice adopted by the Kentucky Court of Appeals should be considered in deciding the important constitutional questions raised by counsel for defendant, Lonnie North.

In addition, the Kentucky Bar Association has a duty to upgrade the lower court judiciary by presenting to this court compelling arguments concerning why all lower court judges, including police judges, should not only be learned in the law but be licensed attorneys.

The decision of the court in this case will directly affect all members of the Kentucky Bar Association practicing law in the Commonwealth of Kentucky, therefore, the interest of your amicus curiae is clear.

ARGUMENT

ALL JUDGES IN CRIMINAL CASES INVOLVING POSSIBLE IMPRISONMENT OF THE ACCUSED SHOULD BE LAWYERS.

Lawyers, by reason of their education and legal experience, are in the best position to observe the poor quality of a lower court judicial system presided over by a judge who is not a lawyer. Rule of the Kentucky Court of Appeals (RCA) 3.130 adopting the American Bar Association's Code of Professional Responsibility (hereinafter referred to as the "Code"), has made it mandatory for lawyers to actively participate in the advancement of our legal system which is of vital importance in maintaining the rule of law. Code EC 8-9. (Appendix, p. 6a). It should be obvious that lawyers, when arguing that all lower court judges should be attorneys at law, are not seeking to forward any selfish goal of the individual attorney or the pro-

fession but rather to meet their special responsibility to the courts and the public by endeavoring to cause judges having criminal jurisdiction to be persons of competence and suitable judicial temperament. The guarantee of a fair criminal trial is the foundation of our democratic society.

Counsel for the appellant herein has made striking and compelling constitutional arguments to support the position that KRS 26.010 and KRS 26.200 (Appendix, pp. 1a, 4a) deny a person charged with a crime in a city of the fourth class equal protection of the laws and due process of law protections accorded to him under the Fourteenth Amendment to the Constitution of the United States and Article Fourteen of the Constitution of Kentucky where the defendant must appear before a police judge who is not learned in the law. It is shocking and contrary to fundamental concepts of justice to learn that a person charged with a crime which may deprive him of his freedom may appear before a Kentucky police court chaired by an individual who is a lawyer, provided the defendant is charged in a city of the first or second class, (KRS 26.140, 26.150) (Appendix, p. 2a), while a defendant charged in a city below the second class will most probably appear before a person not qualified to practice law. A system that imposes unequal protection of the law with substantial and almost certain risks that due process will not be afforded to defendants in a major and basic part of society—rural Kentucky—cannot and will not command the public respect and confidence essential to the effective administration of justice in the United States. Petitioner joins with counsel for appellant in asserting that each individual charged with a crime in Kentucky must have his basic

federal constitutional rights protected in that he has a right to be heard by a judge learned in the law. That is to say, the judge must be a lawyer. Anything less is obviously a denial of equal protection and due process.

In the opinion of the Kentucky Court of Appeals from which this appeal is taken it is stated:

> "We fully appreciate the absurdity of having a lawsuit—any lawsuit—presided over in this day and age by a person without legal training or experience. Nevertheless, it was our conclusion in *Ditty v. Hampton,* Ky., 490 S.W.2d 772 (1973), that the federal constitution does not deny the people the right to have it that way if they so desire."

The Kentucky Bar Association files this amicus curiae brief in support of the conclusion of the Kentucky Court of Appeals' statement as to the absurdity of a judge not having legal training and extending the argument to show the absolute necessity of all judges in criminal matters to be licensed attorneys.

Lawyers practicing before lay judges are frequently placed in a climate which fosters violations of the Code. The layman judge cannot cope with the complex violations of the Code. The public sometimes makes the charge that the judge and the prosecutor have conspired to convict a defendant. A prosecutor who uses his public position to influence or attempt to influence a tribunal to act in favor of himself or of a client is engaged in unethical and unprofessional conduct. Code DR 8-101 (A) (2). (Appendix, p. 6a). It is not uncommon to have a layman judge seeking sole advice from the prosecutor in his court in making his judicial determinations. A man cannot serve two masters. Such consultations by the court with the

prosecutor followed by an adverse ruling to the defendant raise an element of impropriety in the mind of the defendant which can never be erased. Many times to see that justice is done, a prosecutor may have to convince a layman judge that a ruling should be made for a defendant. In such circumstance, the state does not receive the undivided loyalty and energy to be expected from its prosecutor; and the true adversary process is, therefore, violated. The lawyer is in an ethical dilemma. A lawyer in the community who enjoys prominence and political power can find himself in the same position as the prosecutor when the judge who is not a lawyer relies on him to make judicial determinations when he represents a defendant.

Assuming that a defendant is represented by competent counsel, the rights of neither the state nor the defendant may be protected where the judge lacks the legal capabilities of a lawyer. The judge cannot be expected to comprehend the increasing complexities of the criminal law process. An even heavier burden rests on the layman criminal trial judge where the defendant represents himself.

> "When a judge sits on the trial of a criminal case in which the defendant has chosen to be his own lawyer, he must be especially acute and vigilant in governing the conduct of counsel and witnesses in order to insure that it does not jump the tract (sic) and become an inquisition in which the sole end sought is conviction rather than a decision based upon lawful evidence." *Grubbs v. State,* 265 N.E.2d 40, 44 (Ind. 1970).

This court has recognized the limitation on a layman to comprehend legal problems in a criminal case when it held that in a capital crime a defendnat had a right to counsel. The Court said:

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law." *Powell v. Alabama,* 287 U.S. 45 at 68-69 (1932).

In the recent case of *Argersinger v. Hamlin,* 407 U.S. 25, (1972), granting the right to counsel to indigent persons charged with a misdemeanor provided the defendant faces the possibility of being deprived of his freedom, the Supreme Court quoted from its decision in *Gideon v. Wainwright,* 372 U.S. 335, 344 (1963):

> "From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law."

As a matter of fact, many layman police judges in Kentucky are high school graduates at best. To say that a defendant has an equal right to law when he appears before a layman judge of this background is definitely an erroneous statement. If lawyers served as police judges, there would be fewer errors in the proceedings and fewer appeals would be taken from police courts to circuit courts. Frequent is the advice of defense counsel to his client that the best setting for his trial is in circuit court where the judge is a lawyer. Lawyers many times fail to be optimistic about their chances before a layman judge. The presentation of a good defense is of little avail if a layman judge cannot comprehend the arguments made by competent counsel.

> "The trial of vagrancy cases is illustrative. While only brief sentences of imprisonment may be imposed, the cases often bristle with thorny constitutional questions." *Argersinger v. Hamlin, supra,* at 32.

Unfortunately, a majority of defendants appearing in lower courts in this country, for economic reasons, never reaches the appellate level of the courts even though their convictions rest on faulty procedural steps or substantive law concepts. The Task Force Report: The Courts by the President's Commission on Law Enforcement and Administration of Justice (1967) at page 29 reports:

> "No findings of this Commission are more disquieting than those relating to the condition of the lower criminal courts. These courts are lower only in the sense that they are the courts before which millions of arrested persons are first brought, either for trial of misdemeanors or petty offenses or for preliminary hearing on felony charges. Although the offenses that are the business of the lower courts may be 'petty' in respect to the amount of damage that they do and the fear that they inspire the work of the lower courts has great implications. Insofar as the citizen experiences contact with the criminal court, the lower criminal court is usually the court of last resort. While public attention focuses on sensational felony cases and on the conduct of trials in the prestigious felony courts, 90 percent of the Nation's criminal cases are heard in the lower courts.

The importance of the lower courts was emphasized almost 50 years ago in Charles Evans Hughes' admonition to the New York State Bar Association:

> The Supreme Court of the United States and the Court of Appeals will take care of themselves. Look after the courts of the poor, who stand most in need of justice. The secur-

> ity of the Republic will be found in the treatment of the poor and ignorant; in indifference to their misery and helplessness lies disaster."

To protect the public, the Kentucky Court of Appeals has adopted RCA 3.460 (Appendix, pp. 4a-6a), to police the unauthorized practice of law by those not properly trained and licensed in the science of law. It has been recently held that an officer of a bank cannot prepare a real estate mortgage. *Kentucky State Bar Assn. v. Tussey,* 476 S.W.2d 177 (Ky. 1972). It seems apparent to petitioner that if an astute banker cannot prepare a real estate mortgage because of the lack of legal knowledge necessary to protect the public, a layman police judge cannot meet the required standard to conduct a judicial proceeding which could deprive a person of his freedom.

Appellant North states that he has a right to be tried in a court presided over by a competent judge, sufficiently trained and informed in the procedural statutory, constitutional and case law of his jurisdiction, so that all rights, privileges and immunities afforded to him by law will be accorded to him at all stages in the proceedings. In other words, the judge should be "learned in the law." To your amicus curiae, the meaning of the phrase "learned in the law" is ambiguous and meaningless. Other courts have been faced with the problem of giving concrete meaning to this amorphous phrase which appears in several state constitutions. The frequently quoted opinion of the Supreme Court of South Dakota in *Jamieson v. Wiggin,* 12 S.D. 16, 80 N.W. 137 (1899), clearly states your petitioner's position:

> "* * * The phrase, 'learned in the law' will be found in several state constitutions. It is alliterative, euphonious, vague, and indefinite. A person who has never been admitted to the bar may be profoundly learned in the law, while one who has been admitted may be as profoundly ignorant of its principles. Between such a lawyer as Ambassador Choate and 'Squire Tompkins, of Tompkins Corners,' there are as many degrees of learning in the law as there are members of the bar in the United States. Where, then, shall the line be drawn in determining the qualifications of judges under this provision of the constitution? When and by whom shall the question be determined? It was certainly not contemplated that the educational qualifications of a candidate for supreme judge should be determined by a referee or jury in a contested election case, as might be the result were we to hold that his learning in the law is a question of fact, to be ascertained by an examination subsequent to his election. * * *
>
> "* * * Since the state was admitted, all political parties have acted upon the assumption that candidates for office of supreme or circuit judge should be members of the bar. It would certainly surprise the legal profession and people generally to announce that any person not a lawyer might hold either of these offices. Under the constitution, there can be no distinction between supreme, circuit, or county judges with respect to this qualification; and we are constrained to hold that no one is eligible to either position who is not, when elected, either admitted, or entitled to be admitted, without examination, to practice as an attorney at law in this state. In other words, the fact that the candidate is learned in the law must have been ascertained by a competent tribunal prior to the election; the only and conclusive evidence of such fact being an admission to the bar by a court of this or some other

> jurisdiction authorized to license persons to practice as attorneys at law. When elected, the candidate must be an attorney at law. As it affirmatively appears from undisputed evidence that defendant was not 'learned in the law,' within the meaning of that term as herein defined, the judgment of the circuit court is reversed. * * *"

See also *Opinion of the Justices*, 279 Ala. 38, 181 So.2d 105 (1965); *Freiler v. Schuylkill County*, 46 Pa. Super. 58 (1911).

It would be unsound for this court to adopt a policy permitting persons "learned in the law" rather than lawyers to sit as criminal court judges. It is submitted that the Supreme Court of California in *Gordon v. The Justice Court for the Judicial District of Sutter County*, 43 U.S.L.W. 2089 (1974), reached the correct conclusion when it held that a lay judge system requiring passage of a written examination before assuming trial of cases could not withstand an argument of the Fourteenth Amendment. The Supreme Court of California properly held that criminal trial judges have to be lawyers when a jail sentence may be involved. There are no grey areas. The standard is clear and certain. It will not spawn litigation involving the degree of legal learning possessed by lay judges.

Seminars for layman judges designed to attempt to educate them in the particular area of criminal law with which they will be confronted on the bench, while commendable, cannot impart sufficient legal knowledge to cause him to be an effective criminal court judge. This approach has many fallacies. Assuming that you have 100% attendance at the seminars by layman judges with college degrees, the situation is no different. It would be like saying that a business major in college is fit to practice commercial law in the business world after completing a commerce course in business law. The concept will not work. The cost of such an ineffective educational procedure would be much better spent on paying a competent lawyer to serve on the police court bench. The recognition of legal concepts and the manipulation of those concepts to formulate judicial decisions are entirely two different matters. The layman may be taught to do the former. Only a lawyer can do the latter. It is doubtful that layman police judges receiving meager compensation from his judicial work will find the time or the ptaience to attend any legal education program even if he is compensated for his time away from his primary work.

The court requires the attorney advocate appearing for and on behalf of a person accused of a crime to have successfully completed a minimum of five years of college and law school training and to have passed a rigid bar exam before being permitted to represent such defendant. On the other hand, lower court judges, who will make the judgments and rulings on the case, sit in judgment without any legal qualifications whatsoever. This violates all pretense of "equal protection" and "due process."

The standard of conduct required of a lawyer is an extremely high one.

> "A lawyer should maintain high standards of professional conduct and should encourage fellow lawyers to do likewise. He should be temperate and dignified, and he should refrain from all illegal and morally reprehensible conduct.' Because of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession. Obedience to law

exemplifies respect for the law. To lawyers especially, respect for the law should be more than a platitude." Code EC 1-5.

When both the officers of the court—lawyers—and the lawyer-judge have a full understanding, feeling for and appreciation of the noble standard of conduct, it is only then that the public can have reason to have confidence in and respect for the law and their judiciary. It is only then that the lower court system can expect the confidence and respect of the public.

By virtue of Section 143 (Appendix, p. 1a), of the Constitution of Kentucky, the police court is given criminal jurisdiction within the corporate limits of the city concurrent with that of justices of the peace. Any decision of this court in increasing the qualifications presently required of police judges in cities below the second class must necessarily affect the system of justices of the peace in Kentucky. It is the feeling of your amicus curiae that these archaic justice of the peace courts having a foundation in the English legal system and inherited by the United States—a system of layman judges—must go the way of the horse and buggy. All judges having criminal jurisdiction must be lawyers in order to protect the public interest in the judicial process.

The legal profession has, for many years, carried an enormous economic burden in defending indigent defendants in criminal cases before the courts of the Commonwealth of Kentucky without fees or reimbursement for costs before the enactment of the Kentucky Public Defender System by the 1972 General Assembly. Lawyers in fulfillment of their duty to the courts and the public will serve as lower criminal court

judges, at personal sacrifice, to guarantee, as far as humanly possible, the fair administration of justice in the Commonwealth.

Should this court hold that all criminal trial judges must be lawyers, there will be no reason to doubt that there is and will continue to be an ample supply of lawyers to serve on the bench. This court has accurately reflected the ever increasing law school enrollment in *Argersinger v. Hamlin, supra,* at 37, FN. 7. Every year in this country, thousands of *well qualified* applicants to law schools are being denied entry to the legal profession partly because the profession has difficulty in finding legal positions for its members. A great natural resource is not being utilized while layman judges sit in uneducated judgment on whether or not citizens are to maintain and benefit from their fundamental right to a fair criminal trial. This court has enforced citizens rights to counsel in criminal proceedings resulting in possible imprisonment; however, the public will not realize the full light of its wisdom until the judges before whom counsel must argue display equal qualifications evidencing their ability to protect vital constitutional rights of the accused and the state. That is to say, lawyer judges will hear the legal arguments of lawyers.

CONCLUSION

It is respectfully submitted that appellant Lonnie North has been deprived of his rights guaranteed to him by the Constitution of the United States. He has the right to appear before a tribunal consisting of a judge who is a lawyer duly licensed by the highest state court in which he resides. The public will applaud

this court for its action in enforcing this right, and the standards of criminal justice will be greatly upgraded.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Leslie G. Whitmer, Counsel for Kentucky Bar Association, Amicus Curiae herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 1st day of August, 1975, I served on Honorable Ed W. Hancock, Attorney General of Kentucky, Capitol Building, Frankfort, Kentucky 40601, Honorable Wix Unthank, Commonwealth Attorney, Harlan, Kentucky 40831, Attorneys of record for Appellees, C. B. Russell and Nathaniel "Trap" Helton; and Eugene Goss, Central Street, Harlan, Kentucky 40831 and Dean Hill Rivkin, 630 Maxwelton Court, Lexington, Kentucky 40508, Attorneys for Appellant, 3 copies each of this brief of amicus curiae, by mailing same, postage prepaid.

Leslie G. Whitmer

LESLIE G. WHITMER

APPENDIX

CONSTITUTION OF KENTUCKY

POLICE COURTS

§ 143. **Establishment and jurisdiction of.** — A police court may be established in each city and town in this state, with jurisdiction in cases of violation of municipal ordinances and by-laws occurring within the corporate limits of the city or town in which it is established, and such criminal jurisdiction within the said limits as justices of the peace have. The said courts may be authorized to act as examining courts, but shall have no civil jurisdiction: Provided, The general assembly may confer civil jurisdiction on police courts in cities and towns of the fourth and fifth classes, and in towns of the sixth class having a population of two hundred and fifty or more, which jurisdiction shall be uniform throughout the state, and not exceed that of justices of the peace.

KENTUCKY REVISED STATUTES

26.010 Criminal and penal jurisdiction of police courts.

Except as provided in KRS 167.990, 208.020, subsection (4) of 208.990 and 242.990, police courts in cities of every class have jurisdiction exclusive of circuit courts in all penal and misdemeanor cases where the punishment is limited to a fine of not more than twenty dollars, jurisdiction concurrent with circuit courts of all penal and misdemeanor cases where the punishment is limited to a fine of not more than five hundred dollars, or imprisonment not exceeding twelve months, or both, and exclusive jurisdiction of all violations of city ordinances occurring within the city limits.

26.140 Police judge in cities of first class.

The judge of the police court in cities of the first class shall have the qualifications and take the oath required of circuit judges. The judge shall devote his whole attention to the duties of his court. He shall have each year a vacation of two months. Subject to KRS 26.300, the judge may adopt rules and regulations for conducting the business of his court, and may enforce them by process of contempt. He shall have all powers necessary to try cases coming under his jurisdiction. He may administer oaths, and shall be a conservator of the peace. His salary shall be fixed by ordinance, and paid at the same time and in the same manner as the salaries of other city officers.

26.150 Organization and judge of police court in cities of second class.

In cities of the second class the police court shall have one judge. He shall receive a salary fixed by ordinance, and no other compensation except the fees allowed to judges for holding examining trials in felony cases. He shall have each year a vacation of one month. No person shall be eligible to be police judge unless at the time of his election he is at least twenty-five years of age and has been a resident of the city for at least four years.

30.170 Court rules governing practice of law and State Bar.

(1) The Court of Appeals shall adopt and promulgate rules:

(a) Defining the practice of law;

(b) Prescribing a code of ethics governing the professional conduct of attorneys and the practice of law;

(c) Establishing practice and procedure for disciplining, suspending and disbarring attorneys;

(d) Organizing and governing a Bar Association of the attorneys of the state to act as an administrative agency of the Court of Appeals for the purpose of enforcing such rules as are adopted and promulgated by the court under this section; providing for the government of the State Bar as a part of the judicial department of state government, and for such divisions thereof as the Court of Appeals determines; requiring all persons practicing law in this state to be members in good standing of the State Bar; and fixing the form of its organization and operation;

(e) Fixing fees upon recommendation of the board of Bar Commissioners to be paid for the purpose of administering this section and the rules adopted and promulgated under it, and for the collection and disbursement of such fees.

(2) The rules of court adopted and promulgated under this section shall supersede all laws or parts of law in conflict therewith, to the extent of the conflict.

(3) No rule adopted and promulgated under this section shall prevent a person not holding himself out as a practicing attorney from writing a deed, mortgage or will, or prevent a person from drawing any instrument to which he is a party.

26.200 Police judge in cities of fifth and sixth classes.

No person shall be eligible to be police judge in a city of the fifth or sixth class unless he is a resident and voter of the city, and has resided there for a year next preceding his election or appointment. Before entering upon the duties of his office, the judge shall execute a bond to the Commonwealth with good and sufficient sureties, approved by the county judge. The bond shall be filed and recorded in the county clerk's office and an entry made upon the order book of the county court, showing that the bond was executed and approved and giving the names of the sureties. The county judge, at any time that he has reason to believe that the bond is not good or that the sureties are about to become insolvent, shall require that a new bond be executed or additional sureties given on the old one.

RULES OF COURT OF APPEALS OF KENTUCKY

3.130 ABA Code of Professional Responsibility Recognized as Authority.

The Court recognizes and accepts the principles embodied in the American Bar Association's Code of Professional Responsibility as a sound statement of the standard of Professional conduct required of members of the bar, and the Board may cause to be tried all charges brought under this code as well as charges for other unprofessional or unethical conduct calculated to bring the bench and bar into disrepute.

RCA 3.460 Unauthorized Practices Proceeding.

(a) When it comes to the attention of the Director that any person or entity not having the right to

practice law is directly or indirectly practicing law, the Director shall have the authority to cause such investigation to be made concerning the matter as he deems appropriate. If the Director determines that any person or entity has been engaged in the unauthorized practice of law, the Director shall send a letter of warning by certified mail, return receipt requested, to the person's or entity's last known address, requesting that the unauthorized practice of law be discontinued. If future violations occur and in the opinion of the Board action should be taken, it shall direct that a motion in the name of the Association for a show cause rule be filed with the Clerk. The Clerk shall docket the motion and issue a rule against the alleged offender to show cause why he should not be held in contempt for unauthorized practice of law. The rule shall be returnable on the 15th day following service. When procedure is by warning order, service shall be deemed to have been made thirty days after the date of making the warning order.

(b) If the respondent fails to file due response on the rule's return day or files a response admitting the offense, the rule shall forthwith be made absolute, and the Court shall enter such orders as it deems appropriate to deter and punish, which may include injunctive relief.

(c) If the respondent timely files response denying the offense, the Court shall refer the case to a designated circuit judge sitting as a special commissioner, who shall thereupon hold a hearing at such time and place as he may fix, at which hearing the Association shall be represented by counsel designated by the Board for that purpose. The parties may obtain compulsory attendance of witnesses and the production of docu-

ments as provided in the Civil Rules. The special commissioner, at the conclusion of the hearing, may permit the filing of briefs by the parties, and shall make and submit to the Court written findings of fact and recommendations.

(d) Upon filing of the special commissioner's report, the Court may permit the filing of briefs by the parties or may summarily dispose of the matter and shall enter such order as may be appropriate. The Clerk shall furnish counsel and the Director copies of every order entered under this rule and every such order shall be reported and published as are other opinions of the Court.

(e) If the respondent is adjudged guilty, he shall be liable for all court costs, and the provisions of Civil Rule 73.07 shall apply.

AMERICAN BAR ASSOCIATION CODE OF PROFESSIONAL RESPONSIBILITY

ETHICAL CONSIDERATION:

EC 8-9 The advancement of our legal system is of vital importance in maintaining the rule of law and in facilitating orderly changes; therefore, lawyers should encourage, and should aid in making, needed changes and improvements.

DISCIPLINARY RULES:

DR 8-101 Action as a Public Official.

(A) A lawyer who holds public office shall not:

(2) Use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client.